

# CONFLATION OF, AND CONFLICT BETWEEN, REGULATORY MANDATES: MANAGING THE FRAGMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW IN A GLOBALISED WORLD

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## TABLE OF CONTENTS

### PART I

1.	INTRODUCTION.....	2
2.	GLOBALISATION AND FRAGMENTATION: A COMMON CHALLENGE.....	2
3.	INSTITUTIONAL INTERACTION AND THE CONCEPT OF ‘LINKAGE’.....	6
4.	THE NATURE AND CAPACITY OF ‘AUTONOMOUS INSTITUTIONAL ARRANGEMENTS’.....	9

### PART II

5.	CASE STUDIES ON COOPERATIVE INSTITUTIONAL ARRANGEMENTS BETWEEN AND AMONG MEAS.....	11
a)	Formal Agreements Facilitating Institutional Cooperation.....	12
i.	Agreements and other Cooperative Arrangements Based on Overlapping Subject Matter.....	13
ii.	Agreements and other Cooperative Arrangements Based on Intersecting Subject Matter.....	17
iii.	Agreements and other Cooperative Arrangements Based on Functional Synergy.....	17
b)	Institutional Integrated Management.....	18
i.	The Biodiversity Liaison Group (BLG).....	19
ii.	Cooperation between Tuna RFMOs and the Kobe Process.....	20
iii.	The 2010 Extraordinary Meeting of the Chemicals Conventions.....	21
c)	Cooperation and Compliance.....	23

### PART III

6.	SELECTED RISKS ASSOCIATED WITH INSTITUTIONAL INTERACTION AND CLOSER COOPERATION.....	26
7.	CONCLUDING REMARKS: ENHANCING INSTITUTIONAL INTERACTION AND ENVIRONMENTAL GOVERNANCE AND ITS IMPLICATIONS FOR INTERNATIONAL LAW.....	29

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\* School of Law, University of Canterbury, New Zealand. I would like to thank the organisers of the Four Societies Conference 2010 (*International Law in the New Era of Globalisation*) for inviting me to present this paper at their conference in Awaji, Japan (26 – 28 August 2010). I would also like to thank the Australia New Zealand Society of International Law (ANZSIL) and the Japanese Society of International Law (JSIL) for their contribution towards travel, accommodation and other conference expenses. This is a draft paper for discussion at the Third Four Societies Conference, Awaji, Japan 26 – 28 August 2010 and should not be cited.

## PART I

### 1. INTRODUCTION

The concepts of globalisation and fragmentation present both challenges and opportunities for international environmental governance. They are, nevertheless, contradictory concepts. On the one hand globalisation emphasises notions of interdependence and linkage between problems and solutions. Within the field of environmental protection the concept of ecological interdependence has long since been recognised and the globalisation of international environmental law is arguably a necessary component of modern international environmental governance. On the other hand, fragmentation of international law – as characterised by “the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice”<sup>1</sup> – emphasises the isolation and disconnect between regimes and institutions. Nevertheless, both globalisation and fragmentation create similar challenges to international environmental governance: how to manage the interaction between environmental regimes so as to minimise unnecessary conflation of, and conflict between, their regulatory mandates. It is this question that provides the central theme of this paper.

Rather than focusing on the application of treaty law to managing conflated and conflicted treaty mandates, this paper will instead examine selected international environmental governance strategies, which are in various stages of development, and which are designed not just to manage conflict but to maximise the benefits of conflation. One particular strategy will be examined in this paper: the creation of formal cooperative arrangements or other institutional linkages between multilateral environmental agreements (MEAs). Institutional linkages of course occur beyond this narrow category and include informal linkages as well as cooperative agreements between MEAs and environmental institutions such as the United Nations Environment Programme (UNEP) and the Global Environment Facility (GEF), but these other linkages will not be considered as part of this paper due to space constraints. The formal institutional linkages explored in Part II of this paper are divided into three categories; formal agreements facilitating institutional cooperation; institutional integrated management; and cooperative mechanisms connected with compliance issues. It will be concluded that the creation of cooperative arrangements and other institutional connections provides an important mechanism by which the problems associated with fragmentation can be minimised and, more significantly, they can maximise connections and overlaps between regimes, in order to improve international environmental governance. Nevertheless, closer cooperation and institutional integration raises a number of questions relating to the accountability of the regime or institution to its states parties and, more generally, the legitimacy of the regime. Moreover, the impact of these new forms of international governance potentially extends beyond the realm of international environmental law. As Part III of this paper will demonstrate, these governance strategies challenge the fundamentals of the system itself; who we regard as participants within the system, the sources of international law and even its ultimate basis in consent.

### 2. GLOBALISATION AND FRAGMENTATION: THE COMMON CHALLENGE

It is estimated that there are over 500 global and regional multilateral environmental agreements (MEAs) in force today<sup>2</sup> and whilst this undoubtedly represents a measure of success in

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<sup>1</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (A/CN.4/L.682) (13 April 2006) at para. 8.

<sup>2</sup> *Management Review of Environmental Governance within the United Nations System*, prepared by Tadanori Inomata, Joint Inspection Unit, Geneva, 2008 (JIU/REP/2008/3) at para. 42. There are of course many more soft law instruments, joint work programmes and action plans that also contribute towards environmental protection and constitute another component of the international environmental governance framework.

addressing environmental concerns<sup>3</sup> the number of new treaties adopted has been criticised as leading to so-called “treaty congestion”<sup>4</sup> and fragmentation. Fragmentation in of itself does not constitute an inherent positive or negative value judgment. Some commentators have suggested that it reflects an “unprecedented normative and institutional expansion of international law”<sup>5</sup> or a “positive demonstration of the responsiveness of legal imagination to social change.”<sup>6</sup> Others have viewed fragmentation as “leading to inefficiencies, a lack of synergy... inconsistent or contradictory standards”<sup>7</sup> or even jeopardising “the credibility, reliability and consequently, the authority of international law.”<sup>8</sup>

What cannot be denied is that both globalisation and fragmentation of international environmental law has resulted in the creation of regimes and institutions with similar or even conflated regulatory mandates giving rise to the risk of duplication of, divergence and even conflict between, standards and legal obligations. For example, the 1997 Kyoto Protocol<sup>9</sup> promotes the enhancement of carbon sinks such as forests for the purpose of climate change mitigation.<sup>10</sup> Yet an interpretation of the Protocol that permits or even promotes planting homogenous young trees at the expense of managing old growth forests would potentially lead to a conflict with obligations established under the 1992 Biodiversity Convention.<sup>11</sup> Similarly, restrictions on the production of chlorofluorocarbons (CFCs) under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer<sup>12</sup> led to a significant increase in the production of alternatives to ozone depleting substances such as hydrochlorofluorocarbons (HCFCs), which are 10,000 times more potent as a greenhouse gas than carbon dioxide, and thus carry significant potential to undermine the aims and objectives of the Kyoto Protocol.<sup>13</sup>

Even where no direct conflict between treaty obligations occurs, the creation of divergent standards or the development of different managerial approaches to environmental problems carries the potential to undermine the effectiveness of all the regimes concerned. For example, activities involving iron fertilization experiments for climate change mitigation and other purposes have recently come to the attention of the parties of the 1996 Protocol to the

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<sup>3</sup> Nevertheless it has been noted by numerous commentators that despite the steady increase in the number of treaties and other instruments adopted for the purpose of environmental protection, paradoxically, the degradation of the natural environment has got worse. See for example Duncan French, “Managing global change for sustainable development: technology, community and multilateral environmental agreements” 7 (2007) *International Environmental Agreements* 209 – 235 at 209 – 210.

<sup>4</sup> Edith Brown Weiss, “International Environmental Law: Contemporary Issues and the Emergence of a New World Order” 81 (1992 – 1993) *Georgetown Law Journal* 675 – 710 at 697.

<sup>5</sup> Mario Prost and Paul Kingsley Clark, “Unity, Diversity and the Fragmentation of International Law: How Much does the Multiplication of International Organisations Really Matter?” 5 (2006) *Chinese Journal of International Law* 341 – 370 at 343.

<sup>6</sup> Martti Koskenniemi and Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties” 15 (2002) *Leiden Journal of International Law* 553 – 579 at 575.

<sup>7</sup> Phillipe Roche and Franz Zaver Perrez, “International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient Environmental Regime” 16 (2005) *Colorado Journal of International Environmental Law and Policy* 1 - 25 at 15 – 16.

<sup>8</sup> Gerhard Hafner, “Pros and Cons Ensuing from Fragmentation of International Law” 25 (2003 – 2004) *Michigan Journal of International Law* 849 – 863 at 856. See further Andreas Fischer-Lescano and Gunther Teubner, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” 25 (2003 – 2004) *Michigan Journal of International Law* 999 – 1046; Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics” 70 (2007) *Modern Law Review* 1 – 30; Christian Leathley, “An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity” 40 (2007 – 2008) *New York University Journal of International Law and Politics* 259 – 306.

<sup>9</sup> Protocol to the Framework Convention on Climate Change (Kyoto), 37 (1998) ILM 22 (in force 18 June 2001).

<sup>10</sup> Ibid, Article 2(1)(a)(ii).

<sup>11</sup> 1992 Convention on Biological Diversity, 31 (1992) ILM 818 (in force 29 December 1993).

<sup>12</sup> 1987 Protocol on Substances that Deplete the Ozone Layer (Montreal) 26 (1987) ILM 1150 (in force 1 January 1989).

<sup>13</sup> As a response to this the parties to the 1987 Montreal Protocol agreed in 2007 to bring forward the final phase out date of HCFCs. See Decision XIX/6 of the MOP of the Montreal Protocol, UNEP/OzL.Pro.19/7.

London Convention<sup>14</sup> and the parties of the 1992 Biodiversity Convention. In 2008 the parties to the London Protocol declared that the remit of both the Protocol and the Convention includes fertilization activities and, that legitimate scientific research activities should be regarded as placement for a purpose other than mere disposal thereof under Article 1.4.2.2 of the Protocol.<sup>15</sup> The parties to the Protocol are currently in the process of developing a Risk Assessment Framework designed to guide fertilization research activities<sup>16</sup> as well as exploring various options for regulation ranging from a non-binding statement of concern through to an amendment of the definition of dumping under the Protocol and a free standing article relating to fertilization.<sup>17</sup> Simultaneously, the parties to the 1992 Biodiversity Convention adopted Decision IX/16 in 2008,<sup>18</sup> which requested that all parties ensure that ocean fertilization activities do not take place until there is an adequate scientific basis on which to justify those activities. Furthermore, Decision XI/16 requires a global, transparent and effective regulatory mechanism be established prior to carrying out all fertilization activities with the exception of small scale scientific research activities taking place within coastal waters. Although not contradictory per se, it must be noted that the parties to the 1996 Protocol, in contrast to the parties to the Biodiversity Convention, have yet to exclude non-regulatory options for the management of fertilization activities, and, in their consideration of these activities to date, the parties to the 1996 Protocol have made no distinction between coastal and open waters. Apart from the obvious duplication of efforts associated with developing a regulatory response to ocean fertilization, the divergence in approaches between the parties to the 1996 London Protocol and the 1992 Biodiversity Convention may lead to confusion and, if continued, risk undermining the effectiveness of action undertaken by both instruments.

However, it has also been recognised that conflation and overlap between mandates provide significant potential for improving synergy between obligations, policies and programmes as well as opportunities for mutually supportive and more effective implementation. For example, although the 1973 Convention on International Trade in Endangered Species of Fauna and Flora (CITES)<sup>19</sup> is generally regarded as one of the most successful of wildlife treaties, its mandate is constrained to regulating trade in wildlife. Nevertheless, on numerous occasions CITES has adopted trade-related restrictions in connection with species that are subject to conservation measures under other regimes such as such as the 1979 Convention on the Conservation of Migratory Species (CMS)<sup>20</sup> in order to strengthen and supplement those measures.<sup>21</sup>

<sup>14</sup> 1996 Protocol to the London Dumping Convention, 36 (1997) ILM 7 (in force 24 March 2006)

<sup>15</sup> Resolution LC-LP.1 (2008). The parties to the Protocol went on to determine that ocean fertilization activities for purposes other than research should be currently regarded as contrary to the aims of the Convention and Protocol.

<sup>16</sup> See the Annex attached to the Report of the Ocean Fertilization Working Group (LC/SG 32 WP.7 (28 May 2009).

<sup>17</sup> See the Report of the First Meeting of the LP Intersessional Legal and Related Issues Working Group of Ocean Fertilization (LC/COP2/2/5 (20 February 2009).

<sup>18</sup> Decision IX/16 (2008) *Biodiversity and Climate Change*, para. C.4.

<sup>19</sup> 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington) 12 (1973) ILM 1085 (in force 1 July 1975).

<sup>20</sup> Convention on the Conservation of Migratory Species of Wild Animals (Bonn) 19 (1980) ILM 15 (in force 1 November 1983).

<sup>21</sup> John Lanchbety, “The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Responding to Calls for Action from Other Nature Conservation Schemes” in Sebastian Oberthür and Thomas Gehring (eds) *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 157 – 179 at 163. Lanchbety provides two case studies illustrating the synergy between CITES and other wildlife instruments: the protection of the Houbara Bustard (in conjunction with the CMS); and the protection of the vicuña (in conjunction with the 1979 Convention for the Conservation and Management of the Vicuña, Burhenne (eds), *International Environmental Law: Multilateral Treaties* (Berlin: 1974) 979:94 (in force 19 March 1982).

Unsurprisingly, the identification of mechanisms and techniques for managing the risks and maximising the potential associated with the impacts of both globalisation and fragmentation on international environmental law has been given significant attention by international institutions, environmental regimes, policy-makers and commentators in recent years. Two broad approaches to managing conflation and conflict can be identified: the first approach draws on the international rules and principles relating to the interpretation and application of treaties and focuses on managing conflict between regimes; the second approach seeks to utilise and develop environmental governance mechanisms, not only to manage conflict between regimes, but also to maximise the benefits that can be derived from conflated and overlapping mandates.<sup>22</sup> The work of the International Law Commission on the fragmentation of international law<sup>23</sup> largely focuses on the issue of conflict between regimes and the extent to which treaty-based solutions might be utilised to resolve them. By contrast, this article will focus on the identification of governance-based mechanisms for managing conflated and overlapping regimes, with a view to not only minimising conflict, but to improve the overall effectiveness of international environmental law.

International environmental governance is a well established field of research for commentators and policy-makers alike. Whilst academic enquiry focuses primarily on the effectiveness and legitimacy of international environmental governance,<sup>24</sup> policy-makers are more directly concerned with reform. No less than four major international environmental governance reform processes and reviews have been undertaken during the last ten years and numerous smaller studies have been carried out by multilateral environmental agreements (MEAs) acting individually or collectively. It is ironic that the process of international environmental governance review is as fragmented as the system of governance under review! The most extensive review process to date was initiated by the United Nations Environment Programme (UNEP) in 2000 with the adoption of the Malmö Ministerial Declaration, which called for greater coherence and coordination among international environmental law instruments.<sup>25</sup> An open-ended intergovernmental group of ministers was established in 2001 and was tasked with undertaking a comprehensive policy oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened environmental governance.<sup>26</sup> The report of the open-ended group of ministers was adopted at the Seventh Special Session of the Global Ministerial Environmental Forum in 2002.<sup>27</sup> After languishing for a number of years the review process was revitalised in 2009 when the decision was taken to establish a group of regionally representative group of ministers or high-level representatives to develop a set of options for improving international governance to be presented at the Eleventh Special Session in February 2010.<sup>28</sup> The 2009 report of the Group of Consultative Ministers<sup>29</sup> was endorsed at

<sup>22</sup> Rüdiger Wolfrum and Nele Matz, *Conflict in International Environmental Law* (Berlin: Springer) (2003) at 119.

<sup>23</sup> See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (A/CN.4/L.682) (13 April 20006).

<sup>24</sup> See Daniel Bodansky, “The Legitimacy of International Governance: A Coming Challenge for Global International Environmental Law” 93 (1999) *American Journal of International Law* 596 – 624; Steven Bernstein, “Legitimacy in Global Environmental Governance” 1 (2005) *Journal of International Law and International Relations* 139 – 166.

<sup>25</sup> The Malmö Ministerial Declaration was adopted on the occasion of the first Global Ministerial Environmental Forum (established by UNGA Resolution 53/242 *Report of the Secretary General on Environment and Human Settlements*, 28 July 1999).

<sup>26</sup> Decision 21/21 *International Environmental Governance* (Report of the Governing Council on the work of its Twenty-first Session, 5 – 9 February 2001).

<sup>27</sup> Decision SS.VII/1 *International Environmental Governance* (Report of the Seventh Special Session / Global Ministerial Environmental Forum, 13 – 15 February 2002).

<sup>28</sup> Decision 25/4 *International Environmental Governance* (Proceedings of the Governing Council / Global Ministerial Environment Forum at its Twenty-fifth Session, 16 – 20 February 2009).

<sup>29</sup> The Consultative Group met twice during 2009; the first meeting was in Belgrade, 27 – 28 June 2009 and the second meeting was in Rome, 28 – 29 October 2009. See ‘*The Belgrade Process*’ *Developing a set of options for improving*

the Eleventh Special Session<sup>30</sup> and a second Group of Consultative Ministers was established at that meeting to consider broader reform options. This group is due to report to the Twenty-sixth session of the Governing Council in 2011.<sup>31</sup> Simultaneously but separately, two further review processes were initiated by the 2005 World Summit Outcome Resolution adopted by the UN General Assembly in September 2005.<sup>32</sup> The first resulted in the *Delivering as One: Report of the High-level Panel on United Nations System-wide Coherence in the areas of Development, Humanitarian Assistance and the Environment*<sup>33</sup> and the second has led to the initiation of the so-called Informal Consultative Process on the Institutional Framework for the United Nations Environment Activities.<sup>34</sup> A fourth review of international environmental governance was subsequently initiated by the Joint Inspection Unit of the UN and its highly critical report of the current system was released in 2008.<sup>35</sup> Finally, it should be noted that a number of MEAs including CITES, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change (UNFCCC)<sup>36</sup> have engaged – with varying degrees of intensity – in internal governance review processes.<sup>37</sup>

Despite their various origins and disparate mandates the ensuing reports produced by these review processes demonstrate considerable synergy in the problems they identify and the reforms they propose. A common theme running throughout all these reports is the challenges and the opportunities presented by the large number of MEAs operating within the field of environmental protection. All reports recommend that the strengthening of linkages and institutional connections between MEAs constitute a key component of international governance reform. And it is these institutional and formal connections between MEAs that will be explored in the remainder of this article.

### 3. INSTITUTIONAL INTERACTION AND THE CONCEPT OF ‘LINKAGE’

Institutional interaction and “the idea of linkage emerged as a response to the problem of managing global dilemmas in an anarchic world that is governed by weak and fragmented international institutions. Linkage can help in coping with this governance “deficit” by

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*International Environmental Governance*, prepared by the UNEP Executive Director, September 2009 and presented at the Second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, Rome, 26 – 29 October 2009; *Consultative Group of Ministers or High-level Representatives Set of options for improving international environmental governance*, Second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, Rome, 26 – 29 October 2009, UNEP/GCSS.XI/4.

<sup>30</sup> Decision SS.XI/1 *International Environmental Governance* (Report of the Governing Council / Global Ministerial Environment Forum at its Eleventh Special Session, 24 – 26 February 2010).

<sup>31</sup> Ibid at paras. 5 – 8.

<sup>32</sup> GA Resolution A/Res/60/1 (16 September 2005) *2005 World Summit Outcome* at para. 169.

<sup>33</sup> UN General Assembly Resolution A/61/583 (20 November 2006).

<sup>34</sup> See the *Co-Chairman’s Summary of the Informal Consultative Process on the Institutional Framework for the UN’s Environmental Activities* (New York, 27 June 2006) available online at:

[http://www.environmentalgovernance.org/cms/wp-content/uploads/reform\\_docs/GA\\_informal\\_plenary.pdf](http://www.environmentalgovernance.org/cms/wp-content/uploads/reform_docs/GA_informal_plenary.pdf) and the *Informal Consultative Process on the Institutional Framework for the United Nations’ Environment Activities*, Co-Chairs Options Paper (New York, 14 June 2007) available online at: <http://www.un.org/ga/president/61/follow-up/environment/EG-OptionsPaper.PDF>.

<sup>35</sup> *Management Review of Environmental Governance within the United Nations System*, prepared by Tadanori Inomata, Joint Inspection Unit, Geneva, 2008 (JIU/REP/2008/3).

<sup>36</sup> 1992 United Nations Framework Convention on Climate Change (UNFCCC) 31 (1992) ILM 851 (in force 21 March 1994).

<sup>37</sup> See for example *Options for enhanced cooperation among the three Rio Conventions*, Note by the Secretariat, FCCC/SBSTA/2004/INF.19 (2 November 2004) (this paper sets out options to improve cooperation between the members of the Joint Liaison Group, which comprises the 1992 Convention on Biodiversity, the 1992 UNFCCC and the 1996 UNCCD); *Options for enhanced cooperation among the biodiversity related conventions*, Note by the Executive Secretary, UNEP/CBD/WG-RI/1/7/Add.2 (14 July 2005); *Study on Improving Cooperation and synergies between the Secretariats of the Basel, Rotterdam and Stockholm Conventions* UNEP/CHW.8/INF/28 (2006).

unleashing hidden synergies between regimes, thereby creating more effective governance structures.”<sup>38</sup> Linkage and interaction operates on a number of levels and may arise as a result of a deliberate governance strategy or as a consequence of ecological, sociological or functional interdependence.

At the highest level all regimes and institutions are ultimately linked by the fact that they operate within the realm of public international law. Oran Young describes this form of linkage as “embedded” and describes it as a “fact of life” which “reflect[s] and represent[s] the deep structure of international society.”<sup>39</sup> Public international law implicitly underpins all interaction between environmental regimes and institutions and its rules and concepts – such as the law relating to treaties, international organisations and state responsibility – both facilitate and limit the extent of their interaction.

At the next level, linkage might be described as “functional”<sup>40</sup> or, more prosaically, “overlapping.”<sup>41</sup> This occurs where the functional problems or subject matter of the regime are linked or overlap in “biogeophysical or socioeconomic terms”<sup>42</sup> and, whilst they may intersect with one another on a de facto basis,<sup>43</sup> there may be minimal deliberate interaction between them. The term functional linkage might appropriately describe the current relationship between the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>44</sup> and the 1992 UNFCCC in connection with the impacts of climate change on the oceans including coral bleaching and acidification. Of course functional linkage or the identification of overlaps between regimes and institutions will often provide the basis for further, deliberate interaction.

Closely related to functional linkage is a species of interaction which has been described as “behavioural”<sup>45</sup> or “interaction through commitment.”<sup>46</sup> The behaviour or indeed the commitments undertaken in one regime may impact upon or influence conduct within, or indeed treaty obligations agreed to as part of, another regime. Behavioural or commitment interaction may be mutually supportive; for example, action taken to protect individual migratory species under the auspices of the 1979 Convention on Migratory Species is likely to reinforce the more general commitments to conserve biodiversity undertaken pursuant to the 1992 Biodiversity Convention. The work undertaken by the World Trade Organisation (WTO) in connection with fisheries subsidies is similarly likely to prove supportive of the fishery management measures adopted by Regional Fisheries Management Organisations (RFMOs).<sup>47</sup> On the other hand, this form of linkage may lead to conflict between institutions or regimes; the interaction between the WTO and environmental treaties such as CITES and the Kyoto Protocol, which permit the adoption of trade-related measures to support the implementation of treaty commitments,

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<sup>38</sup> Oren Perez, “Multiple Regimes, Issue Linkage and International Cooperation: Exploring the Role of the WTO” 26 (2005) *University of Pennsylvania Journal of International Economic Law* 735 at 735.

<sup>39</sup> Oran R. Young, “Institutional Linkages in International Society: Polar Perspectives” 2 (1996) *Global Governance* 1 – 24 at 8.

<sup>40</sup> Thomas Gehring and Sebastian Oberthür, “Interplay: Exploring Institutional Interaction” in Oran R. Young, Leslie A. King and Heike Schroeder, *Institutions and Environmental Change: Principal Finds, Applications and Research Frontiers* (Cambridge, Massachusetts: The MIT Press) (2008) 187 – 223 at 197.

<sup>41</sup> Oran R. Young, *op cit* n. 39 at 6.

<sup>42</sup> Thomas Gehring and Sebastian Oberthür, *op cit* n. 40 at 197.

<sup>43</sup> Oran R. Young *op cit* n. 39 at 6.

<sup>44</sup> 1982 United Nations Convention on the Law of the Sea (UNCLOS) 31 (1982) ILM 1261 (in force 16 November 1994).

<sup>45</sup> Thomas Gehring and Sebastian Oberthür, *op cit* n. 40 at 204.

<sup>46</sup> *Ibid* at 202; Sebastian Oberthür and Thomas Gehring, “Conceptual Foundations of Institutional Interaction” in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 29 – 51 at 35.

<sup>47</sup> See Olav Schram Stokke and Claire Coffey, “Institutional Interplay and Responsible Fisheries: Combating Subsidies, Developing Precaution” in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 127 – 155.

provides arguably the most high profile example of behavioural or commitment-related linkage.<sup>48</sup> A recent and equally controversial example is provided by the divergent approaches taken by the WTO and the 1992 Biodiversity Convention with respect to access to genetic resources and the distribution of their benefits.<sup>49</sup>

The categories of linkage or interaction described above arise naturally as a result of overlaps in function or the common use of legal tools – such as trade measures – to promote treaty objectives. Other forms of interaction or linkage are pursued deliberately in order to better implement the objectives of a treaty or to improve international environmental governance. Cognitive interaction for example “is driven by the power of knowledge and ideas”<sup>50</sup> and occurs when information or ideas generated by one institution or regime impacts on decision-making or activities within another institution or regime;<sup>51</sup> in essence, when regimes or institutions learn from one another.<sup>52</sup> For example, the compliance mechanism developed by the parties to the 1997 Kyoto Protocol was undoubtedly based on the compliance mechanism which was successfully operating under the auspices of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>53</sup> More recently, an initiative of the CCAMLR Commission<sup>54</sup> – the application of its conservation measures to nationals as well as vessels – was brought to the attention of twenty-seven other fishery bodies at the First Meeting of the Regional Fishery Body Secretariats Network held in 2007 as an example of good practice.<sup>55</sup> Whilst cognitive interaction may take place under the auspices of a formal institutional connection – such as the Regional Fishery Body Secretariats Network – it can also occur informally, outside of any particular institutional arrangement.

Beyond sharing knowledge and ideas, institutions and regimes may choose to actively coordinate their activities through the development of joint work programmes and/ or the creation of joint rules and institutions. Sebastian Oberthür describes this form of linkage as “joint interplay management”<sup>56</sup> although it is more commonly referred to as “clustering”.<sup>57</sup> One of the earliest examples of such interaction occurred – and is continuing to occur – in connection with the protection of the North Sea. The North Sea “regime” comprises the soft

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<sup>48</sup> The literature on the linkage and interaction between trade and the environment is copious. On the topic of institutional linkage between the WTO and environmental regimes see: Alice Palmer, Beatrice Chaytor and Jacob Werksman, “Interactions between the World Trade Organisation and International Environmental Regimes” in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 818 – 204; Oren Perez, *Op cit* n. 38; Olav Schram Stokke, “Trade Measures and Climate Compliance: Institutional Interplay between the WTO and the Marrakesh Accords” 4 (2004) *International Environmental Agreements: Politics Law and Economics* 339 – 357.

<sup>49</sup> See G. Kristin Rosendal, “The Convention on Biological Diversity: Tensions with the WTO TRIPS Agreement over Access to Genetic Resources and the Sharing of Benefits” in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 79 – 102.

<sup>50</sup> Thomas Gehring and Sebastian Oberthür, *op cit*. n. 40 at 200.

<sup>51</sup> Sebastian Oberthür and Thomas Gehring, *op cit*. n. 46 at 35.

<sup>52</sup> Sebastian Oberthür, “Interplay management: enhancing environmental policy integration among international institutions” 9 (2009) *International Environmental Agreements* 371 – 391 at 378. See further Oran Y. Young, “Institutions and the Growth of Knowledge: Evidence from International Environmental Regimes” 4 (2004) *International Environmental Agreements: Politics, Law and Economics* 215 – 228.

<sup>53</sup> *Ibid*.

<sup>54</sup> Established under the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) 19 (1980) ILM 837 (in force 7 April 1982).

<sup>55</sup> See the *Report of the First Meeting of the Regional Fishery Body Secretariats Network*, Rome, 12 – 13 March 2007 (RSN-1) at para. 67.

<sup>56</sup> Sebastian Oberthür, *op cit*. n. 52 at 376.

<sup>57</sup> The concept of “clustering” has gained considerable prominence within all four review processes noted above. See text accompanying notes 25 – 35. See further, Sebastian Oberthür, “Clustering of Multilateral of Multilateral Environmental Agreements: Potentials and Limitations” 3 (2002) *International Environmental Agreements: Politics, Law and Economics* 317 – 340; Oran R. Young, *op cit*. n. 39 at 5.



law Ministerial Declarations adopted at periodic North Sea Conferences,<sup>58</sup> the 1992 Convention on the Protection of the North East Atlantic (OSPAR)<sup>59</sup> and EU law. The synergy between these overlapping institutions with regard to the North Sea has undoubtedly contributed to the successful management of the region.<sup>60</sup> More recently, joint interplay management or clustering as a means of developing linkages and interactions between environmental regimes and institutions has received significant attention. Numerous examples of such interaction can be identified across a range of pollution prevention, wildlife and fishery instruments and some of these will be discussed in Part II of this article below.

The final – or ultimate – level of linkage and interaction has been described by Oran R. Young as “institutional nesting.”<sup>61</sup> Regimes or institutions become institutionally nested when they are “folded into broader institutional frameworks”.<sup>62</sup> The most common example of institutional nesting occurs when protocols are adopted under the auspices of one or more conventions such as the UNECE 1979 Convention on Long-range Transboundary Air Pollution (LRTAP)<sup>63</sup> or the UNECE 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes.<sup>64</sup> The Antarctic Treaty system might also be viewed as an example of institutional nesting.<sup>65</sup>

For the purposes of this article only formal institutional linkages between MEAs will be explored and other forms of informal linkages and the more official connections between treaties, which might be described as institutional nesting, will be excluded from consideration.

#### 4. THE NATURE AND CAPACITY OF ‘AUTONOMOUS INSTITUTIONAL ARRANGEMENTS’

“Autonomous Institutional Arrangements” is the nomenclature coined by Churchill and Ulfstein in their seminal article published in 2000 to describe MEA institutions as a collective.<sup>66</sup> The authors assert that autonomous institutional arrangements constitute “a distinct and different approach to institutionalized collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance.”<sup>67</sup> Although not

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<sup>58</sup> These are available online at:

[http://www.ospar.org/content/content.asp?menu=01310624810000\\_000000\\_000000](http://www.ospar.org/content/content.asp?menu=01310624810000_000000_000000).

<sup>59</sup> 1992 Convention for the Protection of the North East Atlantic (OSPAR) 32 (1993) ILM 1072 (in force 25 March 1998).

<sup>60</sup> Jon Birger Skjaereth, “Protecting the Northeast Atlantic: One Problem, Three Institutions” in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, Massachusetts: The MIT Press) (2006) 103 – 125 at 103.

<sup>61</sup> Oran R. Young, *op cit.* n. 39 at 3 – 4.

<sup>62</sup> Ibid.

<sup>63</sup> 1979 UNECE Convention on Long-Range Transboundary Air Pollution, 18 (1979) ILM 1442 (in force 16 March 1983). Eight protocols providing for specific regulation of particular pollutants are “nested” within LRTAP.

<sup>64</sup> UNECE 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes, (in force 6 October 1996) (text available online at: <http://www.unece.org/env/water/text/text.htm>). The 1992 UNECE Water Convention is supplemented by two protocols. Most unusually, the 2003 Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters (not yet in force) is also a protocol to a second, entirely separate instrument: the 1992 UNECE Convention on the Transboundary Effect of Industrial Accidents (31 (1992) ILM 1333 (in force 19 April 2000)). The text of the 2003 Protocol is available online at: <http://www.unece.org/env/civil-liability/protocol.html>.

<sup>65</sup> The 1959 Antarctic Treaty (402 UNTS 71, in force 23 June 1961) is supplemented by the 1991 Environmental Protocol to the 1959 Antarctic Treaty (30 (1991) ILM 1461, in force 14 January 1998). However, three further closely related instruments (the 1972 Convention on the Conservation of Antarctic Seas (11 (1972) ILM 251, in force 11 March 1978), the 1982 CCAMLR and the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (27 (1988) ILM 868, not in force) as well as relevant decisions and other instruments combine with the Treaty and its Protocol to comprise the Antarctic Treaty System.

<sup>66</sup> Robin Churchill and Geir Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law” 94 (2000) *American Journal of International Law* 623 - 659.

<sup>67</sup> Ibid at 625.

strictly an international organisation,<sup>68</sup> the composite structure of an autonomous institutional arrangement – which normally comprises a conference of the parties, a secretariat, scientific or subsidiary bodies and, more than likely, a compliance mechanism – performs functions similar to many international organisations.<sup>69</sup> These functions may include the development of formal and informal relationships with other MEAs as well as international organisations and institutions; in short, a ‘foreign policy’ function.<sup>70</sup>

Nevertheless, whilst it is undisputed that international organisations may possess treaty making powers,<sup>71</sup> the extent to which autonomous institutional arrangements or, more narrowly, the Conference of the Parties (COP), possess international legal personality is less clear. Unsurprisingly no MEA has explicitly designated its institutions as international legal persons. However, such an express designation is not necessary under international law.<sup>72</sup> The possession of international legal personality can be implied by the nature of the organisation or institution and its functions. In the words of the International Court of Justice (ICJ), an organisation’s “members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.”<sup>73</sup> Although the ICJ was of course referring to an intergovernmental organisation – the United Nations – there is no obvious reason why the doctrine of implied powers cannot be applied to autonomous institutional arrangements.<sup>74</sup> A significant proportion of the institutions established by MEAs are required by their parties to cooperate with other appropriate convention bodies or international environmental organisations in order to further the objectives of the treaty. A typical example is provided by Article 23(4)(h) of the Convention on Biodiversity, which requires the conference of the parties to “contact, through the secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them.” Other MEAs have developed their foreign policy mandate through the adoption of decisions at the conference of the parties. For example, the Thirteenth Meeting of the Parties (MOP) of the 1987 Montreal Protocol on Ozone Depleting Substances decided to “support appropriate collaboration and synergies that may exist between multilateral environmental agreements, as agreed by the Parties to those agreements.”<sup>75</sup> The 1971 Ramsar Convention on Wetlands of International Importance<sup>76</sup> has included a reference to supporting joint work plans and partnerships with other conventions in its 2009 – 2015 Strategic Plan.<sup>77</sup> Even those MEAs that do not expressly provide for collaboration and cooperation clauses will normally include a wide ranging provision that permits the COP or other bodies such as the secretariat to “exercise such other functions as are required for the

<sup>68</sup> The terms “international organisation” and “international institution” are not definitively defined and can be used to describe an intergovernmental body, an international regime or even a set of norms. See further John Duffield, “What are International Institutions?” 9 (2007) *International Studies Review* 1 – 22.

<sup>69</sup> See further Geir Ulfstein, “Treaty Bodies” in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press) (2007) 877 – 889.

<sup>70</sup> Ibid at 885.

<sup>71</sup> As evidenced by the adoption in 1986 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (reference). On international organisations and international legal personality more generally see: C. F. Amerasinghe, *Principles of the International Law of International Organizations* (Cambridge: Cambridge University Press) (2005), chapter 3; Philippe Sands and Pierre Klein, *Bovett’s Law of International Institutions* (London: Sweet and Maxwell) (2001), chapter 15; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (The Hague: Martinus Nijhoff Publishers) (2001) chapter 12; N. D. White, *The Law of International Organisations* (Manchester: Manchester University Press) (1996), chapter 2.

<sup>72</sup> N. D. White, Ibid, at 27.

<sup>73</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Rep. (1949) at 179.

<sup>74</sup> This conclusion is supported by Robin Churchill and Geir Ulfstein, *op cit.* n. 66 at 886.

<sup>75</sup> Decision XIII/29 *Recognising the preparations for the world summit on sustainable development 2002*, para. 3.

<sup>76</sup> 1971 Convention on wetlands of International Importance (Ramsar), 11 (1972) ILM 963 (in force 21 December 1975).

<sup>77</sup> *Resolution X.1 (The Ramsar Strategic Plan, 2009 – 2015)*, Strategy 3.1.

achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.”<sup>78</sup> Consequently, it can be concluded that to the extent that it is necessary to carry out the functions of the MEA, autonomous institutional arrangements, acting collectively or individually have been implicitly endowed with legal personality and capacity by their contracting parties.<sup>79</sup> In many if not most cases that personality extends to include the capacity to enter into treaties and other agreements. These powers are though inevitably limited by the nature and functions of the MEA and, in many (if not all) cases, are restricted to collaboration with other MEAs, international institutions (such as UNEP or GEF) and scientific, technical or other non-governmental organisations.

## PART II

### 5. CASE STUDIES ON COOPERATIVE INSTITUTIONAL ARRANGEMENTS BETWEEN AND AMONG MEAS

The creation of formal linkages and institutional cooperative arrangements between MEAs has been identified as one mechanism for addressing the challenges presented by the globalisation and fragmentation of international law and partnerships between MEAs “have become an important element in the organizational landscape of environmental governance.”<sup>80</sup> The extent to which MEAs develop formal links and cooperative institutional arrangements depends in part upon their legal capacity to do so and in part upon the enthusiasm and willingness of their institutions acting individually or collectively. In practice the success or otherwise of these arrangements often comes down to the role played by the MEA secretariat.<sup>81</sup> Increasingly, secretariats are regarded as “actors in their own right”,<sup>82</sup> capable of driving a normative agenda. In a recent study on environmental bureaucracies, significant differences in the perceived and actual influence of individual secretariats over the direction and operation of their respective MEAs were identified.<sup>83</sup> For example, the secretariats to the 1992 Biodiversity Convention and

<sup>78</sup> Although this text was taken from Article 7(m) of the 1992 UNFCCC, it is typical of the vast majority of MEAs.

<sup>79</sup> This conclusion would appear to be supported by the opinion of the UN Office of Legal Affairs, which in 1993 asserted that the UNFCCC established “an international entity/ organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat (Articles 3, 7-10).” The Opinion went on to note that the UNFCCC had capacity to establish cooperative arrangements with other competent international organisations and bodies. See United Nations Office of Legal Affairs, Arrangements for the Implementation of the Provisions of Article 11 of the UN Framework Convention on Climate Change Concerning the Financial Mechanism, para. 4 (Nov. 4, 1993) and UN Doc. A/AC.237/50 (1993) cited in Robin Churchill and Geir Ulfstein, *op cit.* n. 66 at 647 – 648 and at footnotes 156 and 158.

<sup>80</sup> Liliana B. Andonova, “International organisations as entrepreneurs of environmental partnerships” in Frank Bierman, Bernd Siebenhüner and Anna Schreyögg, *International Organisations in Global Environmental Governance* (London: Routledge) (2009) 195 – 222 at 220.

<sup>81</sup> It should be noted that the legal basis and structure of secretariats can be divided into four broad categories. First, secretariats which are provided by a UN body, such as the International Maritime Organisation (IMO), which administers 50 instruments relating to shipping safety and marine environmental protection or the United Nations Education, Social and Cultural Organisation (UNESCO) which administers the 1972 Convention for the Protection of the World Cultural and Natural Heritage (11 (1972) ILM 1294, in force 17 December 1975). Second, secretariats which are administered by UNEP. UNEP provides the secretariat for nine global conventions and protocols and eight regional conventions and protocols including the 1973 CITES, the 1989 Basel Convention and the 1979 CMS. Third, secretariats which are institutionally linked with UNEP but which operate independently of it such as the 1992 UNFCCC and the 1996 UNCCD. Finally, there are those secretariats that operate entirely independently of the UN such as those that administer the 1959 Antarctic Treaty and the 1992 OSPAR Convention.

<sup>82</sup> Steffan Bauer, Per-Olf Busch and Bernd Siebenhüner, “Treaty Secretariats in Global Environmental Governance” in Frank Bierman, Bernd Siebenhüner and Anna Schreyögg, *International Organisations in Global Environmental Governance* (London: Routledge) (2009) 174 – 191 at 174.

<sup>83</sup> Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (Cambridge, Massachusetts: The MIT Press) (2009). See in particular chapters 9, 10, 11 and 12.

the 1994 United Nations Convention to Combat Desertification (UNCCD)<sup>84</sup> were both viewed as dynamic institutions able to exercise “significant influence on international negotiations and cooperation”<sup>85</sup> and “significant normative influence in the convention process.”<sup>86</sup> By contrast, the secretariat to the 1992 UNFCCC was perceived as operating within a straitjacket imposed by the parties to the Convention leaving little room for a “proactive role or [for] autonomous initiatives.”<sup>87</sup>

Unsurprisingly, those MEAs benefiting from a more dynamic secretariat such as the 1992 Biodiversity Convention would appear to have engaged to a much greater extent in fostering institutional cooperation between MEAs, as will be demonstrated below. Although the linkages and examples of institutional interaction between MEAs are now numerous, this article will focus primarily on the formal linkages between MEAs and MEA institutions. Moreover, only three categories of institutional linkage will be explored. The first category comprises the formal agreements often referred to as Memoranda of Understanding (MOU) between MEAs. The second category consists of three examples of institutional integrated management; cooperative arrangements that go beyond the typical MOU but do not yet amount to full legal or nested arrangements. In the third category the focus will be on the connections and linkages that are being developed by MEA compliance mechanisms or in the more general context of compliance.

#### a) Formal Agreements and other Cooperative Arrangements Facilitating Institutional Cooperation

Concluding a formal agreement or MOU with one or more other MEAs provides a clear external demonstration of linkage between those MEAs. An ever increasing number of MEAs are adopting formal agreements with a growing number of partners. For example, the 1992 Convention on Biodiversity has concluded 134 agreements to date with partners that include international organisations, universities, non-governmental organisations (NGOs), botanical gardens and eighteen other MEAs. The 1973 CITES has concluded a rather more modest fourteen partnership agreements, four of which are with other MEAs. However, this trend is not ubiquitous; the 1959 Antarctic Treaty for example, has entered into no official partnership agreements. Moreover, partnership agreements vary considerably in their objects and purposes; some are intended to provide for little more than the exchange of information and to facilitate the mutual exchange of observers at meetings whereas others establish joint work programmes and create liaison positions. What has yet to be definitively determined is whether these agreements are legally binding or whether they are entirely political or administrative in nature. Whilst a minority of agreements expressly state that they are not intended to be legally binding<sup>88</sup> the vast majority are silent as to their status. Whilst some commentators take the view that MOUs can never be legally binding,<sup>89</sup> others suggest that they only *tend* to be legally non-

<sup>84</sup> 1994 Convention to Combat Desertification, 33 (1994) ILM 1016 (in force 26 December 1996).

<sup>85</sup> Bernd Siebenhüner, “The Biodiversity Secretariat: Lean Shark in Troubled Waters” in Frank Bierman and Bernd Siebenhüner (eds), *op cit.* n. 83, 265 – 291 at 284.

<sup>86</sup> Steffan Bauer, “The Desertification Secretariat: A Castle Made of Sand” in Frank Bierman and Bernd Siebenhüner (eds), *op cit.* n. 81, 293 – 317 at 300.

<sup>87</sup> Per-Olf Busch, “The Climate Secretariat: Making a Living in a Straitjacket” in Frank Bierman and Bernd Siebenhüner (eds), *op cit.* n. 83, 245 – 244 at 251 and 261.

<sup>88</sup> The MOU between the 1982 CCAMLR and the Western and Central Pacific Fisheries Commission (WCPFC), which entered into force in January 2009 expressly states that it does not contain legally binding commitments. The MOU is reproduced in Annex 6 of the *Report of the Twenty-seventh Meeting of the CCAMLR Commission* (2008). Similarly, the proposed MOU between CCAMLR and the Agreement on the Conservation of Albatrosses and Petrels (ACAP) is also expressly intended to be non-binding. The text of the proposed MOU is reproduced in Annex 8 of the *Report of the Twenty-eighth Meeting of the CCAMLR Commission* (2009).

<sup>89</sup> Rüdger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer) (2003) at 173.

binding.<sup>90</sup> In fact, the focus on the term “MOU” is rather misleading. Not all agreements between MEAs are described as MOUs. For example, a number of the agreements between the 1992 Biodiversity Convention and other MEAs are described as “memorandum of cooperation (MOC)” and the 1971 Ramsar Convention uses the nomenclature of “cooperative agreement” in addition to both MOU and MOC. The title of the agreement is thus of limited assistance in determining its legal status. Moreover, a significant proportion of agreements between MEAs contain what arguably amount to formal obligations in connection with information exchange or participation in joint activities as well as detailed provisions relating to duration, modification and termination of the agreement. In at least two cases, the agreement includes a formal a dispute settlement clause<sup>91</sup> and two further agreements appear to include a clause which purports to limit the liability and agency capacity of each MEA.<sup>92</sup> To the untrained – and indeed the trained – eye many such agreements appear to wear (if not flaunt) some of the trappings of a legally binding instrument. Nevertheless, even if they are to be considered binding the extent of their legal obligations is likely to reach no further than the institutions of the MEA including – possibly – the COP. Such agreements are unlikely to bind individual states party to the relevant MEA in the absence of an express provision to the contrary.

The agreements highlighted below to demonstrate the nature and extent of institutional linkage and formal cooperation among MEAs represent only a snapshot of the hundreds of agreements which have been entered into to date. It is not intended – and indeed it is not possible within the confines of this article – to provide a comprehensive overview of these agreements.<sup>93</sup> Instead, a small number of agreements, which have been divided into three categories on the basis of their objects and purposes, will be explored in order to demonstrate the possibilities and indeed the limitations of these agreements as a mechanism for managing the challenges of globalisation and fragmentation within international environmental law.

i. Agreements and other Cooperative Arrangements Based on Overlapping Subject Matter

The largest category comprises formal agreements or other cooperative arrangements based on synergies or overlaps in subject matter. As noted above, the most active MEA in the adoption of agreements and the creation of cooperative arrangements is the 1992 Biodiversity Convention. The secretariat to the CBD is provided with an extensive mandate to establish appropriate forms of cooperation under Article 23(4) of the Convention and this role has been reinforced in a number of decisions adopted under the Convention<sup>94</sup> and in the Strategic Plan for the

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<sup>90</sup> Geir Ulfstein, “Treaty Bodies” in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press) (2007) at 887.

<sup>91</sup> The 2004 Memorandum of Cooperation (MOC) between the 1992 Biodiversity Convention and the UN Food and Agriculture Organisation on Cooperation between the CBD and the Secretariat of the International Plant Protection Convention (IPPC) and the 2009 MOC between the CBD and the Secretariat of the Pacific Regional Environment Programme (SPREP) both include dispute resolution clauses.

<sup>92</sup> Article 3(A) of the 2005 MOC between the CBD and the Ramsar Convention stipulates that “this MOC constitutes an expression of a shared objective and vision. However, each party’s actions will be considered to be that party’s sole and separate action, for all purposes, and neither party shall claim to be acting on behalf of, or as agent for, the other party to this MOC.” Similarly the 2002 MOU between the Secretariat of CITES and the Secretariat of the CMS stipulates that “neither secretariat shall be legally or financially liable in any way for activities carried out jointly or independently” (Article 5(c)).

<sup>93</sup> See *Synergies and Cooperation: A Status report on activities promoting synergies and cooperation between Multilateral Environmental Agreements, in particular biodiversity-related conventions and related mechanisms*, prepared by the UNEP World Conservation Monitoring Centre, Cambridge, UK, May 2004.

<sup>94</sup> See Decision II/13 *Cooperation with other biodiversity related conventions*; Decision IV/15 *The relationship of the Convention on Biological Diversity with the Commission on Sustainable Development and biodiversity related conventions, other international agreements and processes of relevance*; Decision VI/20 *Cooperation with other organizations, initiatives and conventions*; Decision

Convention on Biological Diversity.<sup>95</sup> The Biodiversity Convention has entered into formal cooperative arrangements with: the 1991 Alpine Convention<sup>96</sup> and 2003 Carpathian Convention<sup>97</sup> (2008); the 1979 Bern Convention<sup>98</sup> (2001, revised in 2008); the 1983 Cartagena (Caribbean Seas) Convention<sup>99</sup> (1997); 1973 CITES (1996, revised in 2001); the 1979 Convention on Migratory Species (1996); the 1994 UNCCD (1998); the 1951 International Plant Protection Convention<sup>100</sup> (2004); the Secretariat of the Pacific Regional Environmental Programme (SPREP) (2009); and the 1971 Ramsar Convention (1996, revised in 2005).<sup>101</sup> The CBD has also entered into a multiagency agreement with five other biodiversity instruments and this will be the subject of discussion below.<sup>102</sup>

The majority of these agreements are similar in scope, extent and format. They all provide for obligations related to information exchange, normally through utilisation of the CBD Clearing House; for mutual participation at relevant meetings; and for the development of joint work programmes. All agreements provide for clauses governing the duration, modification and termination of agreements. One agreement – the 1998 MOC between the 1992 CBD and the 1996 UNCCD – is notable in that it goes well beyond the scope of the other agreements in terms of its content. For example, it requires the parties to begin the process of developing a harmonised approach to reporting, and encourages further integration of their respective secretariats. Moreover, the MOC recommends that the parties explore mechanisms to enhance links and processes in New York and other UN centres in order to provide appropriate representation at relevant meetings. Other proposals contained within the MOC include the establishment of two liaison staff in New York that are employed by the UNCCD but report to both Conventions and the creation of a closed list forum to improve interaction and exchange of information among the secretariats. As noted above, a recent study of international environmental bureaucracies concluded that both the CBD Secretariat and, more particularly, the UNCCD Secretariat were dynamic and influential actors in their own right<sup>103</sup> and it is highly likely that the exceptional scope of this particular agreement is a result of the dynamic nature of both institutions.

The cooperative agreements entered into by other MEAs such as the 1973 CITES, the 1971 Ramsar Convention and the 1979 CMS Convention are all expressed in terms similar to those described above. The 1971 Ramsar Convention in particular has developed extensive

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VII/26 *Cooperation with other conventions, international organisations and initiatives*; Decision IX/27 *Cooperation among multilateral environmental agreements and other organisations*. In addition there are a further 58 decisions on substantive topics that call for cooperation between the CBD and other biodiversity-focused MEAs. They are all available online at: <http://www.cbd.int/cooperation/decisions.shtml>.

<sup>95</sup> Decision VI/26 *Strategic Plan for the Convention on Biological Diversity*, Goals 1.2 and 4.4.

<sup>96</sup> 1991 Framework Convention for the Protection of the Alps (in force 1995). Text available online at: [http://www.alpconv.org/theconvention/index\\_en](http://www.alpconv.org/theconvention/index_en).

<sup>97</sup> 2003 Framework Convention for the Protection and Sustainable Development of the Carpathians (in force 2006). Text available online at: <http://www.carpathianconvention.org/text.htm>.

<sup>98</sup> 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern), UKTS 56 (1982) Cmd. 8738 (in force 1 June 1982).

<sup>99</sup> 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 22 (1983) ILM 221 (in force 11 October 1986).

<sup>100</sup> 1951 International Plant Protection Convention (IPPC) (text revised, 1997). Revised text available online at: [https://www.ippc.int/file\\_uploaded/publications/13742.New\\_Revised\\_Text\\_of\\_the\\_International\\_Plant\\_Protection.pdf](https://www.ippc.int/file_uploaded/publications/13742.New_Revised_Text_of_the_International_Plant_Protection.pdf)

<sup>101</sup> The text of all of these cooperative agreements are available online at: <http://www.cbd.int/agreements/>.

<sup>102</sup> See text accompanying notes 136 – 152 below.

<sup>103</sup> See the references cited in notes 85 – 86 above.



institutional links with twenty-one MEAs<sup>104</sup> and the importance of partnership agreements and joint work plans was endorsed in the recently adopted Ramsar Strategic Plan 2009 – 2015.<sup>105</sup> Similarly, seven of the thirty CMS partners are MEAs and close cooperation “with relevant multilateral environmental agreement and key partners to maximise synergies and avoid duplication” is a key component of the CMS Strategic Plan 2006 – 2011.<sup>106</sup> The consolidation of existing partnerships – rather than the adoption of new ones – through the development of renewable joint work programmes is an identified key priority area for the CMS.<sup>107</sup> The 1973 CITES has entered into fewer partnership agreements and only two have been concluded with MEAs on the basis of overlapping subject matter: with the CBD (1996)<sup>108</sup> and the CMS (2002).<sup>109</sup> Notably the CITES / CMS MOU was reaffirmed by CITES Resolution Conf.13.3 (2004) in which the parties directly requested that CITES initiatives should support the regional collaborative activities on-going under the auspices of the CMS in respect of the saiga antelope, marine turtles, the great white shark, whale sharks and sturgeons.<sup>110</sup> Nevertheless, the conclusion of partnership arrangements with suitable MEA and other organisations has been included as a central component of the CITES Strategic Vision 2008 – 2013.<sup>111</sup>

The adoption of partnership agreements is not exclusively the preserve of biodiversity MEAs although these conventions undeniably dominate this category of cooperative arrangements. In 2006 the conferences of the parties to the Basel,<sup>112</sup> Stockholm<sup>113</sup> and Rotterdam<sup>114</sup> Conventions all adopted decisions establishing a joint working group with the task of making recommendations for the improved cooperation and coordination between these instruments in the area of chemicals and hazardous waste management.<sup>115</sup> This process began what is arguably evolving into the most successful cooperative arrangement to date, which will be discussed further below. Similarly, regional fishery management organisations (RFMOs) are establishing institutional cooperative links for the primary purpose of exchanging information and knowledge. For example, the 1982 CCAMLR Commission has recently adopted an MOU with the Commission for the Conservation and Management of Highly Migratory Fish Stocks in

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<sup>104</sup> The full list of Ramsar partners are available online at: [http://www.ramsar.org/cda/en/ramsar-documents-mous/main/ramsar/1-31-115\\_4000\\_0](http://www.ramsar.org/cda/en/ramsar-documents-mous/main/ramsar/1-31-115_4000_0).

<sup>105</sup> Resolution X.1 *The Ramsar Strategic Plan 2009 – 2015*, strategy 3.1.

<sup>106</sup> Resolution 8.2 (2002) *CMS Strategic Plan 2006 – 2011*, operational principle 2.

<sup>107</sup> Resolution 9.6 (2008) *Cooperation with other bodies*. See also Resolution 7.9 (2002) *Cooperation with other bodies and processes* and Resolution 8.11 (2005) *Cooperation with other Conventions*. An overview of the CMS cooperative arrangements is provided in UNEP/CMS/Conf.9.23 (5 November 2008) *Report on CMS Activities with Partners*.

<sup>108</sup> Memorandum of Cooperation between the Secretariat of CITES and the Secretariat of the CBD (1996) available online at: <http://www.cbd.int/doc/agreements/agmt-cites-1996-03-23-moc-web-en.pdf>.

<sup>109</sup> Memorandum of Understanding between the Secretariat of CITES and the Secretariat of the CMS (2002) available online at: <http://www.cites.org/common/disc/sec/CITES-CMS.pdf>.

<sup>110</sup> Resolution 13.3 (2004) *Cooperation and Synergy with the CMS*.

<sup>111</sup> Resolution Conf. 14.2 (2007) *Strategic Vision 2008 – 2013*, objectives 3.3 and 3.5.

<sup>112</sup> 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) 28 (1989) ILM 657 (in force 24 May 1992).

<sup>113</sup> 2001 Convention on Persistent Organic Pollutants (Stockholm) 40 (2001) ILM 532 (in force 17 May 2004).

<sup>114</sup> 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam), 38 (1999) ILM 1 (in force 24 February 2004).

<sup>115</sup> See Decision VIII/8 *Cooperation and coordination between the Basel, Rotterdam and Stockholm Conventions* (2006) adopted by the Basel Conference of Parties; Decision SC-2/15 *Synergies* (2006) adopted by the Stockholm Conference of Parties; and Decision RC-3-8 *Cooperation and Coordination between the Rotterdam, Basel and Stockholm Conventions* adopted by the Rotterdam Conference of Parties.

the Western and Central Pacific Ocean (WCPFC)<sup>116</sup> and has agreed the text for an MOU with the secretariat of the Agreement on the Conservation of Albatrosses and Petrels (ACAP).<sup>117</sup> One of the most extensive cooperative institutional networks is the Regional Fishery Body Secretariats Network (RSN) created in 2005.<sup>118</sup> This is an informal network of up to thirty-five fishery secretariats, which focuses on information exchange and administration. It has no decision-making powers and it has been expressly recognised that the policy-making function and mandate essentially rests with the members of the organisation represented.<sup>119</sup> The informal network met in 2007<sup>120</sup> and 2009<sup>121</sup> and provided a forum for fishery secretariats to exchange information, experiences and ideas connected with all aspects of fishing but with particular emphasis on IUU fishing; a model example of cognitive interaction.

Finally, it is worth noting that some MEAs have recognised the importance of cooperation with other MEAs and have taken unilateral formal steps to promote such cooperation through the adoption of formal decisions or resolutions. For example, the conference of the parties to the 1989 Basel Convention has adopted a number of decisions emphasising the close relationship in terms of subject matter between itself and the IMO.<sup>122</sup> In particular, Decision IX/12 (2008) requested that the Secretariat to the Basel Convention keep the IMO informed in connection with relevant developments taking place under the auspices of the Convention; encouraged cooperation between the IMO and the Basel Secretariat with especial reference to the implementation of MARPOL 73/78;<sup>123</sup> and asked the open-ended working group to develop recommendations designed to identify and address gaps not covered by either the Basel Convention or IMO conventions. More specifically, Decision IX/30 also adopted in 2008 addressed the relationship between the Basel Convention and the IMO in the context of ship dismantling, and made detailed recommendations to the IMO on matters of substance, as well as suggestions as to the process of consultation and collaboration.<sup>124</sup> A similar approach has been taken by the parties to the Antarctic Treaty in respect of their interaction with the IMO. Whilst in the past the Antarctic Treaty has deliberately avoided direct institutional interaction with MEAs and other institutions outside of the Antarctic Treaty system, issues such

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<sup>116</sup> The MOU entered into force in January 2009 and the text of the MOU is reproduced in Annex 6 of the *Report of the Twenty-seventh Meeting of the CCAMLR Commission* (2008).

<sup>117</sup> The text of the proposed MOU is reproduced in Annex 8 of the *Report of the Twenty-eighth Meeting of the CCAMLR Commission* (2009).

<sup>118</sup> The RSN replaces the FAO Regional Fisheries Bodies Group which was established in 1999 and the change of name was agreed in 2005. See the *Report of the Fourth Meeting of Regional Fishery Bodies*, Rome, 14 – 15 March 2005 at paras. 5 and 7.

<sup>119</sup> *Ibid* at para. 5.

<sup>120</sup> See the *Report of the First Meeting of the Regional Fishery Body Secretariats Network*, Rome, 12 – 13 March 2007 (RSN-1).

<sup>121</sup> See the *Report of the Second Meeting of the Regional Fishery Body Secretariats Network*, Rome, 9 – 10 March 2007 (RSN-2).

<sup>122</sup> See Decision VIII/9 *Cooperation between the Basel Convention and the International Maritime Organization* (2006); Decision IX/12 *Cooperation between the Basel Convention and the International Maritime Organization* (2008). See more generally, Decision VIII/7 *International cooperation and coordination* (2006); Decision IX/11 *International Cooperation and Coordination* (2008).

<sup>123</sup> International Convention for the Prevention of Pollution by Ships (MARPOL) 12 (1973) ILM 1319 amended by Protocol of 1978 relating thereto before entry into force (in force 2 October 1983).

<sup>124</sup> Decision IX/30 *Dismantling of Ships* (2008). The IMO, Basel Convention and International Labour Organisation (ILO) participated in three joint meetings between 2005 and 2008 of the working group on ship scrapping (see the following documents: ILO/IMO/BC WG 1/8 (18 February 2005); ILO/IMO/BC WG 2/11 (14 December 2005); ILO/IMO/BC WG 3/6 (31 October 2008)). Resolution 2 adopted at the conclusion of the 2009 International Convention for the Safe and Environmentally Sound Recycling of Ships acknowledged the contribution of the ILO and the Basel Convention to the development of the Convention.



as the ban on the use and carriage of heavy grade fuels by vessels and the development of the Polar Code, has made cooperation with the IMO not only desirable but inevitable.<sup>125</sup> In response to what essentially amounts to a globalisation of Antarctic issues, the parties to the 1959 Antarctic Treaty adopted in 2010, Resolution 5, which establishes a system of responsibility and procedure for keeping the parties informed of the progress of Antarctic initiatives within the IMO.<sup>126</sup>

ii. Agreements and other Cooperative Arrangements Based on Intersecting Subject Matter

In contrast to the cooperative agreements between MEAs on the basis of overlapping subject matter the number of agreements based on intersecting subject matter is much smaller. The most high profile example of such an agreement is the Joint Liaison Group (JLG), which was formed in 2001 between the secretariats of the 1992 Convention on Biodiversity, the 1992 UNFCCC and the 1996 UNCCD.<sup>127</sup> The JLG was established as an informal forum for the exchange of information and to facilitate the development of options for further cooperation. The group has met nine times since 2001 and has developed joint work programmes on forests and on the biodiversity of dry and sub-humid lands.<sup>128</sup> However, its capacity to take policy decisions is limited. Moreover, at the ninth meeting of the JLG in 2009 it was noted that “there remains a disconnect between the roles and mandates given to the JLG by each convention with this disconnect resulting in limitations when considering the implementation of the requested activities.”<sup>129</sup> In particular, it was pointed out that only those activities that are mandated by the governing body of each convention could be implemented by the JLG.<sup>130</sup> This disconnect may result – at least in part – from the fact that these three instruments have quite different aims and objectives and although their subject matter intersects it does not necessarily overlap.

iii. Agreements and other Cooperative Arrangements Based on Functional Synergy

The final category of cooperative arrangements exploits synergies in function rather than subject matter. The term function is used here to refer to the tools and mechanisms used by an MEA to achieve its objects and purposes. Functions might include regulating trade in the subject matter of the treaty, establishing catch limits, licensing vessels or other users such as importers and exporters. It is of course not always possible to draw a distinction between function and subject matter; the networks and other cooperative arrangements between RFMOs for example exploit

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<sup>125</sup> Karen N. Scott, “Safety of Shipping in the Southern Ocean” 16 (2010) *Journal of International Maritime Law* 21 – 44 at 43 – 44.

<sup>126</sup> Resolution 5 (2010) *Co-ordination among Antarctic Treaty Parties on Antarctic Proposals under Consideration in the IMO*. The Resolution recommends that when a party or group of parties has initiated a proposal that results in a referral to the IMO that initiating party is responsible for reporting to the Antarctic Treaty Consultative Meetings (ATCM) and intersessionally on the progress of that proposal within the IMO. That party is also responsible for informing the ATCM when further action may need to be considered in order to further the objectives of the ATCM.

<sup>127</sup> See Decision 13.8 *Cooperation with other conventions* (2002) adopted by the conference of the parties to the 1992 Convention on Biodiversity.

<sup>128</sup> Further details are provided online at: <http://www.cbd.int/cooperation/activities.shtml>.

<sup>129</sup> *Report of the Meeting of the Joint Liaison Group of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, and the United Nations Framework Convention on Climate Change*, New York, 14 May 2009 at para 11.

<sup>130</sup> *Ibid.*

commonalties in function – utilisation of catch limits, licensing requirements, catch documentation schemes etc. – as well as subject matter: fish. Similarly, the cooperative arrangement developed by the Basel, Stockholm and Rotterdam Conventions noted above and to be discussed further below might also be categorised as a functional arrangement notwithstanding the close connection between the subject matter of each regime. This conclusion would appear to be supported by the adoption of the Prague Declaration on enhancing cooperation among chemical-related multilateral environmental agreements by the parties to the 1987 Montreal Protocol on Ozone Depleting Substances in 2004. Amongst other things, in this Declaration, the parties affirmed their commitment to seeking alliances with other multilateral instruments like the Basel, Stockholm and Rotterdam conventions “to contribute to an effective strategic approach to international chemicals management.”<sup>131</sup>

However, a small number of cooperative agreements have been adopted by MEAs with very different objects and purposes but which demonstrate significant functional similarities. The most obvious example of such an agreement is the 2002 MOU among the Secretariats of the 1973 CITES, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1989 Basel Convention.<sup>132</sup> This MOU seeks to capitalise on the synergies in functions between these very different instruments – they all to a greater or lesser extent seek to regulate trade in, transport and transfer of (respectively) wildlife, ozone depleting substances and hazardous waste – in order to improve compliance with all three instruments. The MOU provides for the exchange of information, mutual observation of meetings, joint training (particularly for customs officers, the police and the judiciary) and sharing techniques relating to gathering and analysing information. The MOU permits each secretariat to seek information held in the databases maintained by each of the other Conventions but requires the consent of the relevant secretariat before that information can be released. Finally, the MOU requires that each secretariat must nominate a liaison person responsible for implementing the MOU.<sup>133</sup> The purpose of this arrangement is primarily cognitive interaction; each regime learns from the experiences and initiatives of the other with a view to improving the effectiveness of all three regimes.

#### b) Institutional Integrated Management

The second category of institutional cooperation comprises what is described here as institutional integrated management. Examples of cooperation within this category go beyond what is required by the standard MOU. Institutional integrated management requires institutions to engage in broader and deeper cooperative activities. Three examples are identified in order to demonstrate institutional integrated management: the biodiversity liaison group (BLG); the Kobe process and joint activities of the tuna RFMOs; and the 2010 extraordinary meeting of the chemicals conventions.

##### i. The Biodiversity Liaison Group

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<sup>131</sup> *Prague Declaration on enhancing cooperation among chemicals-related multilateral environmental agreements* (2004) reproduced in Annex V of the *Report of the Sixteenth Meeting of the Parties to the Montreal Protocol*, 22 – 26 November 2004. The synergies and need to continue cooperation between the Montreal Protocol and the Basel Convention were recently noted at the Twenty-first meeting of the parties to the Montreal Protocol in 2009. See the *Report of the Twenty-first Meeting of the Parties to the Montreal Protocol*, 4 – 8 November 2008 at para. 207.

<sup>132</sup> Text available online at: <http://www.cites.org/common/disc/sec/CITES-BASEL-OZONE.pdf>.

<sup>133</sup> Ibid.

The Biodiversity Liaison Group (BLG) was an initiative of the conference of parties to the 1992 Biodiversity Convention in 2004. Decision VII/26 urged “further enhanced cooperation between the Convention on Biological Diversity and all relevant international conventions” and requested that the Executive Secretary “invite the secretariats of the other four biodiversity conventions (CITES, Ramsar, CMS and the World Heritage Convention) for form a liaison group to enhance coherence and cooperation in their implementation.”<sup>134</sup> The liaison group was formalised in 2006 with the adoption of the Memorandum of Cooperation between Agencies to Support the Achievement of the 2010 Biodiversity Target<sup>135</sup> and expanded to include a sixth member; the secretariat of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture.<sup>136</sup> The BLG normally meets annually at chief Officers level<sup>137</sup> and meetings are convened by the 1992 Biodiversity Convention.<sup>138</sup> The BLG has identified two priority areas of focus which comprise the 2010 Biodiversity Target and the Global Partnership on Biodiversity.<sup>139</sup> Overall, the achievements of the BLG are thus far rather modest. The focus to date has largely been confined to integrating the activities of all six biodiversity conventions into current initiatives rather than developing new projects or programmes. For example, the BLG agreed in 2005 to adopt biodiversity indicators for all five biodiversity conventions that are consistent with the framework of goals and targets adopted by the CBD in 2004<sup>140</sup> in order to promote coherence among the conventions in both policy development and implementation.<sup>141</sup> The most tangible outcome of the BLG to date is the development of an interactive CD-Rom on the application of the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity<sup>142</sup> within all six biodiversity conventions. This project was initiated in 2006<sup>143</sup> and completed in 2008. The CD-ROM contains all relevant decisions adopted by the six conventions connected to the Addis Ababa Principles and Guidelines and, most importantly, includes guidelines agreed jointly by all six conventions for each principle.<sup>144</sup>

Although the focus on strengthening participation in existing projects is hardly surprising given the large number of joint and other collaborative programmes that are currently underway involving all conventions, the lack of progress in other areas is disappointing. Whilst the six conventions have established a joint website<sup>145</sup> there is little evidence of further administrative integration. This is despite the fact that ideas for closer cooperation – such as harmonised reporting, joint representation at non-biodiversity meetings and joint missions – have been discussed on a regular basis at meetings.<sup>146</sup> One obstacle to further integration at the international level appears to be the fact that the national focal points for each convention are often in different government departments, which makes coherent implementation a

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<sup>134</sup> Decision VII/26 *Cooperation with other conventions and international organisations and initiatives* (2004), paras. 1 and 2. The mandate of the BLG was renewed in Decision IX/27 *Cooperation among multilateral environmental agreements and other organizations* (2008).

<sup>135</sup> Text of the 2006 MOC is available online at: <http://www.cbd.int/doc/agreements/agmt-hoatf-cites-2006-10-15-moc-web-en.pdf>.

<sup>136</sup> 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (in force 29 June 2004). Text available online at: [http://www.planttreaty.org/texts\\_en.htm](http://www.planttreaty.org/texts_en.htm).

<sup>137</sup> It should be noted that no meeting took place in 2007.

<sup>138</sup> This was agreed at the second meeting of the BLG held on 16 August 2004.

<sup>139</sup> This was also agreed at the second meeting of the BLG.

<sup>140</sup> See CBD Decision VII/30 *Strategic Plan: future evaluation of progress* (2004).

<sup>141</sup> See the *Third Meeting Final Report*, 10 May 2005 at para. 16. For further information on the Biodiversity Indicators Partnership (which extends beyond the six biodiversity conventions) see: <http://www.twentyten.net/>.

<sup>142</sup> See CBD Decision VII/12 *Addis Ababa Principles and Guidelines for Sustainable Use* (2004).

<sup>143</sup> See the *Fifth Meeting Final Report*, 14 September 2006 at paras 20 – 24.

<sup>144</sup> The contents of the CD are also available to download at: <http://www.cbd.int/doc/programmes/socio-eco/use/aagp/AAGP.zip>.

<sup>145</sup> At: <http://www.cbd.int/blg/>.

<sup>146</sup> See the *Third Meeting Final Report*, 10 May 2005 at paras. 19 – 21 and the *Seventh Meeting Final Report*, 1 May 2009 at paras. 47 and 48.

challenge.<sup>147</sup> Moreover, there is also evidence of a level of tension within the BLG between the six biodiversity conventions resulting from differences in priorities and resources. For example, at the Fifth Meeting in 2006 the representative for CITES “recalled that the 2010 biodiversity target was agreed within the CBD without prior consultation with other processes. He said that the 2010 biodiversity target as well as the process to achieve the Millennium Development Goals (MDGs) were not central objectives in CITES implementation and that the CITES constituency was only beginning to take these on board.”<sup>148</sup> Similarly, at the Sixth Meeting held in 2008 representatives of both CITES and the World Heritage Organisation indicated that it was difficult if not impossible to provide resources for the preparation of the third edition of the *Global Biodiversity Outlook*.<sup>149</sup> Most significantly, there appears to be no vision to take the BLG beyond the 2010 Biodiversity Target. It is likely that a post 2010 vision will be agreed by the CBD conference of the parties at its tenth meeting, which is due to be held in Nagoya, Japan in October 2010. However, it is disappointing that the six biodiversity conventions as a collective have taken so few steps to – at the very least – develop a proposed mandate to extend its operation meaningfully beyond 2010.<sup>150</sup>

## ii. Cooperation between Tuna RFMOs and the Kobe Process

A rather more successful example of integrated institutional management is demonstrated by the cooperative arrangement entered into by the five tuna RFMOs as part of the so-called Kobe process. Although informal cooperation between the RFMOs has occurred since 1999, Japan, in 2005, proposed that the five tuna RFMOs – the Inter-American Tropical Tuna Commission (IATTC); the International Commission for the Conservation of Atlantic Tunas (ICCAT); the Indian Ocean Tuna Commission (IOTC); the Western and Pacific Fisheries Commission (WCPFC); and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) – convene a joint meeting. The first meeting was held in Kobe in 2007 and this was followed by a Chair’s meeting in San Francisco in 2008 and a second meeting of the RFMOs was held in San Sebastian in 2009. Whilst an important function of the joint meetings is to provide a forum within which to share information, knowledge and experiences – the essentials of cognitive interaction – the primary objective is to “go beyond reinforcing current work of the RFMOs and... to address issues at a global level where the work of the individual RFMOs is not sufficient.”<sup>151</sup> The Kobe process thus attempts to address the inherent structural weakness in tuna fisheries management: that whilst “vessels move globally from one resource to another... tuna stocks are managed by organisations that are ‘regional’ by definition.”<sup>152</sup>

Although only three years into the Kobe process, the five RFMOs acting collectively have made significant progress towards institutional integrated management. A joint website has been established<sup>153</sup> and the five RFMOs have agreed to allow access to their IUU vessel lists and licensed vessel lists centrally on this website.<sup>154</sup> Furthermore, the five RFMOs have agreed that their performance should be reviewed in accordance with a common methodology and that the

<sup>147</sup> See the *Fifth Meeting Report*, 14 September 2006 at para. 1.

<sup>148</sup> See the *Fifth Meeting Final Report*, 14 September 2006 at para. 11.

<sup>149</sup> See the *Sixth Meeting Report*, 31 May 2008 at paras 16 – 20.

<sup>150</sup> The BLG and the Chairs of the Scientific Advisory Bodies of the Biodiversity-related Conventions (CSAB) held a combined meeting in Paris on 20 January 2010. However, this was not a formal meeting but rather an exchange to coordinate activities amongst conventions for the International Year for Biodiversity. No formal report of the meeting has been issued.

<sup>151</sup> This is the third principle identified by the Chair of the second meeting. See the *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, 29 June – 3 July 2009.

<sup>152</sup> Opening statement made by Toshiro Shirasu, Director General of the Fisheries Agency of Japan at the first joint meeting. See the *Report of the Joint Meeting of the Tuna RFMOs*, Kobe, Japan, January 22 – 26 2007.

<sup>153</sup> The website is found at: <http://www.tuna-org.org/>.

<sup>154</sup> This was agreed at the first joint meeting which took place in Kobe in 2007. It should be noted that the CCSBT does not maintain an IUU vessel list that is publicly accessible.



review reports should be made available collectively on the joint website.<sup>155</sup> Moreover, the RFMOs have developed the so-called “Kobe Chart” which is designed standardise the presentation of stock assessments and to facilitate the adoption of management decisions on the basis of best scientific advice.<sup>156</sup> All five tuna RFMOs are now using the Kobe Chart<sup>157</sup> and the RFMOs have begun the process of developing a “strategy matrix” for managers which will identify common options for meeting management targets including the options of ending overfishing and rebuilding depleted stocks.<sup>158</sup> Compliance issues and the management of Illegal Unregulated and Unreported (IUU) fishing have dominated discussions at both meetings as well as the Chairs’ meeting which took place in 2008.<sup>159</sup> Various options for improving compliance through collaborative measures have been explored including the development of harmonised criteria for the listing and delisting of IUU vessels<sup>160</sup> and the adoption of centralised and integrated compliance measures.<sup>161</sup>

The progress of the tuna RFMOs through the Kobe process towards integrated institutional management compares favourably with the progress (or lack thereof) of the Biodiversity Liaison Group (BLG) discussed above. However, it must be acknowledged that the tuna RFMOs, in contrast to the six biodiversity conventions that comprise the BLG, benefit from similar if not identical objects and purposes and very similar mandates for the management of tuna stocks. Nevertheless, the question of how to progress the Kobe process is as pertinent to the five tuna RFMOs as is the question of how to progress the BLG to the six biodiversity conventions. At the second meeting of the tuna RFMOs held in San Sebastian in 2009 the possibility of holding a Ministerial meeting in conjunction with the third meeting (Kobe III) was discussed. While some participants were of the view that holding a simultaneous Ministerial meeting would provide necessary additional political will to implement the Kobe process others preferred to maintain the Kobe process outside the political framework. No consensus was reached on the proposal.<sup>162</sup>

### iii. The 2010 Extraordinary Meeting of the Chemicals Conventions

The final and most extensive example of integrated institutional management to date resulted in the 2010 extraordinary meeting of the Basel, Stockholm and Rotterdam Conventions. This is the first simultaneous meeting of autonomous MEAs at the global level<sup>163</sup> and provides the most visible demonstration of the evolving close cooperative arrangement between these three conventions. The origins of the Extraordinary Meeting and the broader cooperative initiatives developed by these MEAs can be found in decisions taken by all three conferences of the parties

<sup>155</sup> This was agreed at the first joint meeting which took place in Kobe in 2007.

<sup>156</sup> Ibid.

<sup>157</sup> As noted at the second joint meeting which took place in San Sebastian in 2009.

<sup>158</sup> As agreed at the second joint meeting Ibid. See the attachment to Appendix I of the *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, 29 June – 3 July 2009.

<sup>159</sup> See the *Report of the RFMOs Chairs’ Meeting, San Francisco*, 5 – 6 February 2008.

<sup>160</sup> See the *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, 29 June – 3 July 2009.

<sup>161</sup> See the *Report of the RFMOs Chairs’ Meeting, San Francisco*, 5 – 6 February 2009.

<sup>162</sup> See the *Report of the Second Joint Meeting of Tuna RFMOs*, San Sebastian, Spain, 29 June – 3 July 2009.

<sup>163</sup> At the regional level it must be noted that a joint meeting took place between the OSPAR and the Helsinki Commissions (with responsibility for the North East Atlantic and the Baltic Sea respectively) in 2003. This led to a joint declaration (available online at:

<http://www.helcom.fi/stc/files/MinisterialDeclarations/HelcomOsparMinDecl2003.pdf>) and a joint work

programme on marine protected areas (information available online at:

[http://www.helcom.fi/stc/files/BremenDocs/Joint\\_MPA\\_Work\\_Programme.pdf](http://www.helcom.fi/stc/files/BremenDocs/Joint_MPA_Work_Programme.pdf)). Although a second joint meeting was proposed for 2010 this does not appear to be scheduled to take place although both Commissions will be meeting independently during 2010.

in 2006.<sup>164</sup> As a result of these decisions an ad hoc joint working group was established by the three conventions in order to make joint recommendations on mechanisms to improve cooperation between the parties whilst respecting their autonomy. The working group met three times between March 2007 and March 2008 and its third report<sup>165</sup> provided the basis for the adoption of the so-called synergy decisions by the three MEAs in 2008.<sup>166</sup> By virtue of these decisions the three conferences of the parties initiated a detailed programme of work to develop or explore a wide range of options for enhancing cooperation and coordination among the conventions. Included among the many recommendations were proposals for developing joint implementation at the national level, for promoting programmatic cooperation in the field and for promoting the use of regional centres for supporting the implementation of all three conventions. The decisions also called upon the parties to improve coordination at the international level through exploring options for harmonising the reporting obligations of parties<sup>167</sup> and in connection with compliance. A significant proportion of the decisions were aimed at enhancing institutional cooperation and requested that the parties in conjunction with the directors of the appropriate UN bodies<sup>168</sup> explore options for joint management, including a joint head of the three secretariats. Furthermore, the decisions established on an interim basis a joint resource mobilisation service within the secretariats of the respective conventions in Geneva. It also authorised the establishment of joint financial, administrative legal, information technology and information services also on an interim basis. Finally, the decisions recommended that Basel, Rotterdam and Stockholm meetings should be held in a coordinated manner and, most significantly, that a simultaneous extraordinary meeting should be convened to further consider issues of cooperation and coordination.<sup>169</sup>

The first Simultaneous Extraordinary Meeting of the three MEAs was held in Bali in February 2010 and was organised as a back-to-back meeting with the eleventh session of the UNEP Governing Council / Global Ministerial Environmental Forum. In his opening remarks to the meeting the Executive Director of UNEP noted that the “synergies process held the potential for a paradigm shift, through which the numerous and disparate instruments in existence would be managed holistically to achieve synergies of purpose and effort.”<sup>170</sup> Nevertheless, as a matter of process the autonomy of each MEA was maintained and proposals on both substantive and procedural matters were presented separately to each of the Presidents of the parties to his or her convention. Decisions were taken separately by the conference of the parties to each convention. However, in respect of the Omnibus Decisions the Presidents of each conference brought their gavels down simultaneously and declared in unison the adoption

<sup>164</sup> Decisions VIII/8 (Basel, 2006); SC-2/15 (Stockholm, 2006); RC-3/8 (Rotterdam, 2006) all cited in full in note 115 above. See also UNEP/CHW.8/INF/28 *Study on Improving Cooperation and synergies between the Secretariats of the Basel, Rotterdam and Stockholm Conventions* (2006).

<sup>165</sup> See UNEP/FAO/CHW/RC/POPS/JWG.3/3 *Report of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of its Third Meeting*, Rome, 25 – 28 March 2008. See also UNEP/FAO/CHW/RC/POPS/JWG.1/4 *Report of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of its First Meeting*, 26 – 28 March 2007; UNEP/FAO/CHW/RC/POPS/JWG.2/18 *Report of the Ad hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of its Second Meeting*, Vienna, 10 – 13 December 2007.

<sup>166</sup> See Decision IX/10 *Cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions* (Basel, 2008); Decision RC-4/11 *Enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions* (Rotterdam, 2008); SC-4/34 *Enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions* (Stockholm, 2008).

<sup>167</sup> This recommendation was restricted to the reporting obligations under the Basel and Stockholm conventions only.

<sup>168</sup> These comprised the Executive Director of UNEP and the Director-General of the Food and Agriculture Organisation.

<sup>169</sup> See the synergy decisions noted in footnote 167 above.

<sup>170</sup> See the *Report of the simultaneous extraordinary meetings of the conferences of the parties to the Basel, Rotterdam and Stockholm conventions*, Bali, 22 – 24 February 2010, UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 at para. 7.

of the decisions in a gesture symbolising the new cooperative and integrated approach to environmental governance.<sup>171</sup> The Omnibus Decisions<sup>172</sup> encourage the parties of all three conferences to implement the synergies decisions adopted in 2008.<sup>173</sup> In particular, the Omnibus Decisions promote the full use of regional centres and encourages the parties to report on their joint activities and programmatic cooperation.<sup>174</sup> Furthermore, the Decisions request that the three secretariats identify cross-cutting and joint activities that may be included in the programmes of work for each of the three conventions.<sup>175</sup> Moreover, the interim joint services designed to support all three secretariats as set out in the synergies decisions were endorsed by the parties through the Omnibus Decision<sup>176</sup> and, most significantly, the Decisions authorise the creation of a joint head function to manage the three conventions.<sup>177</sup> These arrangements are due to be reviewed at the ordinary meetings of the Basel, Rotterdam and Stockholm conventions in 2013.<sup>178</sup>

The relationship between the Basel, Rotterdam and Stockholm conventions represent the clearest example of clustering to date. These three MEAs have built upon the clear overlaps and links between the substance and functions of their respective conventions in order to create an integrated management and administrative structure whilst acknowledging the autonomy each instrument within its own regulatory sphere. The initiatives developed in the 2008 synergies decisions and confirmed in the 2010 Omnibus Decision are designed to improve implementation through mutual support, cognitive interaction, efficiency savings and ultimately, joint management. It is important to acknowledge that in 2006 when the process of review was initiated that neither secretariat established under the Rotterdam and Stockholm conventions were fully functional. Pragmatically, this meant that there were fewer institutional obstacles to the creation of joint managerial and administrative functions. Nevertheless, the inherent logic of clustering as is being developed by these MEAs is abundantly clear. Although it is too soon to assess the success of this arrangement, it is likely that other MEAs that might be similarly clustered, will be watching the progress of the chemicals cluster closely.

### c) Cooperation and Compliance

The third category of institutional cooperation focuses on institutional interaction in the context of compliance. A natural consequence of the proliferation of both treaties and non-compliance mechanisms<sup>179</sup> is the conflation and possible conflict between proceedings in the event that a state is alleged to be in breach of its obligations under two or more MEAs.<sup>180</sup> One

<sup>171</sup> Ibid at paras. 10 and 27.

<sup>172</sup> All three decisions are identical apart from a small number of minor differences between their preambles. See BC.Ex-1/1 *Omnibus decision adopted by the conference of the parties to the Basel Convention* reproduced in Annex I of the *Report*, op cit. n. 171.

<sup>173</sup> Ibid, para. I.2.

<sup>174</sup> Ibid, paras. I.4 – I.7.

<sup>175</sup> Ibid, para. I.9.

<sup>176</sup> Ibid, paras, III.1 – III.7.

<sup>177</sup> Ibid, para II.3.

<sup>178</sup> Ibid, para. VI.1.

<sup>179</sup> There are over twenty non-compliance mechanisms in operation today and a further four are in the advance stages of negotiation. See Karen N Scott, “Non-compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements” in Duncan French and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart) (2010) 225 – 270 at 225. See further, Jan Kabbers, “Compliance Procedures” in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press) (2007) 995 – 1009; Tullio Treves et al (ed) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: TMC Asser Press) (2009).

<sup>180</sup> The relationship between non-compliance mechanisms and dispute resolution is a further source of possible conflation and conflict but due to space constraints, will not be discussed in this article. See further M. Fitzmaurice and C. Redgwell, “Environmental Non-compliance Procedures and International Law” XXXI (2000) *Netherlands*

high profile example of such conflation arose out of the dispute between Ireland and the United Kingdom over the Mixed Oxide Fuel (MOX) reprocessing plant under construction on the north west coast of the UK in the early 1990s. Ireland initiated proceedings under the 1982 UNCLOS<sup>181</sup> and separately under the 1992 OSPAR Convention<sup>182</sup> against the UK, although the dispute ultimately became dominated by the question of division of competencies as between the EC and its member states with respect to marine environmental protection.<sup>183</sup> Notably, there was little if any institutional interaction between the bodies variously charged with resolving the dispute.<sup>184</sup> More recently – and rather more positively from the perspective of institutional cooperation – the Ukraine’s controversial decision to construct the Danube-Black Sea shipping Canal in the Bystroe estuary of the Danube Delta led neighbouring state Romania and an interested NGO (Ecopravo-Lviv (EPL)) to institute compliance proceedings under five separate MEAs: the 1998 Aarhus Convention;<sup>185</sup> the 1979 Bern Convention; the 1979 Migratory Species Convention; the 1991 Espoo Convention<sup>186</sup> and the 1971 Ramsar Convention. Whilst the obligations alleged to have been breached under the various conventions are not identical,<sup>187</sup> they are nevertheless closely related and mutually reinforcing.

To date, only a minority of non-compliance mechanisms have included provisions that expressly address their relationship and extent of interaction with other non-compliance mechanisms and external bodies.<sup>188</sup> Four non-compliance mechanisms currently permit their compliance committee or other relevant body to consult with other relevant organisations and / or to solicit advice or information from other compliance mechanisms as appropriate: the Technical and Compliance Committee of the Western and Central Pacific Fisheries Commission;<sup>189</sup> the Compliance Committee of the 1998 Aarhus Convention;<sup>190</sup> the Compliance Committee of the 1999 Protocol on Water and Health;<sup>191</sup> and the Compliance Committee of

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*Yearbook of International Law* 35 - 65; G. Handl, “Compliance Control Mechanisms and International Environmental Obligations” 5 (1997) *Tulane Journal of International and Comparative Law* 29 - 49; Karen N. Scott, *Ibid* at 254 – 258;

<sup>181</sup> *The MOX Plant Case*, Ireland v. UK, Request for Provisional Measures Order, December 3 2001 reproduced in 41 (2002) *ILM* 405; *The MOX Plant Case*, Ireland v. United Kingdom, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, reproduced in 42 *ILM* (2003) 1187.

<sup>182</sup> *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, Ireland v. UK, Final Award (2 July 2003) reproduced in 42 *ILM* (2003) 1118.

<sup>183</sup> ECJ 30 May 2006, Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635.

<sup>184</sup> See further, Robin Churchill and Joanne Scott, “The MOX Plant Litigation: The First Half-Life” 53 (2004) *ICLQ* 643–676; Karen N. Scott, “The MOX Case before the European Court C-459/03, *Commission v. Ireland*” 22 (2007) *International Journal of Marine and Coastal Law* 303 – 316.

<sup>185</sup> 1998 Convention on Access to Information, Public Participation in decision-making and access to Justice in Environmental Matters (Aarhus), 38 (1999) *ILM* 517 (in force 29 October 2001).

<sup>186</sup> 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo) 30 (1971) *ILM* 802 (in force 27 June 1997).

<sup>187</sup> Alleged breaches variously referred to issues connected to an apparent failure to provide for appropriate public participation in the decision to build the canal, a lack of consultation with neighbouring states and the impact of the scheme on a vulnerable ecosystem and associated migratory and wetland species. For the background to this case see Alistair S. Rieu-Clarke, “An Overview of Stakeholder Participation – What Current Practice and Future Challenges? Case Study of the Danube Delta” 18 (2007) *Colorado Journal of International Environmental Law and Policy* 611 - 632; Tanya D. Sobol, “An NGO’s Fight to Save Ukraine’s Danube Delta: The Case for Granting Non-governmental Organizations Formal Powers of Enforcement” 17 (2006) *Colorado Journal of International Environmental Law and Policy* 123 - 163;

<sup>188</sup> See generally Cesare Pitea, “Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?” in Tullio Treves et al (ed) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: TMC Asser Press) (2009) 439 – 450.

<sup>189</sup> 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC), Article 11(5).

<sup>190</sup> Decision I/7(2002) *Review of Compliance* ECE/MP.PP/2/Add.8 2 April 2004 at para. 39.

<sup>191</sup> 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes 29 (1999) *EPL* 200 (in force 4 August 2005). See Decision I/2 (2007) *Review of Compliance*, ECE/MP.WH/2/Add.3 EUR/06/5069385/1/Add.3 3 July 2007 at para. 37. Paragraph 38 of Decision I/2 permits the Committee to transmit information to the secretariats of other MEAs for consideration in



the 1995 Barcelona Convention for the Protection of the Mediterranean.<sup>192</sup> Furthermore, the draft texts of the two compliance procedures in the advanced stages of negotiation under the auspices of the 1998 Rotterdam Convention on Prior Informed Consent<sup>193</sup> and the 2001 Stockholm Convention on POPs<sup>194</sup> also permit the Compliance Committee to solicit information from other compliance committees dealing with hazardous substances and wastes.

No non-compliance mechanism has thus far developed formal procedures for coordinating on-the-ground information gathering missions and for facilitating the issue of coherent and complementary non-compliance measures. These issues are however, under consideration by the Basel, Rotterdam and Stockholm Conventions pursuant to the directive issued by the conferences of parties under the synergies decisions adopted in 2008<sup>195</sup> and by the five tuna RFMOs as part of the Kobe cooperation process.<sup>196</sup> Nevertheless, a successful ad hoc joint compliance operation has been initiated in connection with the Brystoe Canal development referred to above. Representatives from the five MEAs within which non-compliance proceedings had been initiated by Romania together with the European Commission and the International Commission for the Protection of the Danube River (ICPDR) conducted a joint fact finding mission in the Ukraine in 2004.<sup>197</sup> Furthermore in 2008 the Secretariat of the 1991 Espoo Convention organised an informal consultation among interested MEA bodies with a view to considering possible measures that might be taken to support the Ukraine to comply with its international obligations.<sup>198</sup> This was followed by two further joint Missions – in July 2008 and September 2009 led by the secretariats of the Bern Convention and the Espoo Convention respectively.<sup>199</sup> At the most recent Informal Consultation Meeting held in June 2009 and attended by the secretariats of five MEAs and representatives from a further four organisations the following joint statement was issued:

The organizations agreed: (a) to continue to work together; (b) each to notify the other organizations on the outcomes of key events in the following months (including meetings of the parties); (c) to meet again within one year to continue to exchange information and experiences of specific issues common to the agreements and also to review developments on the matter discussed present meeting. The Organizations noted with concern the recent

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accordance with their applicable procedures on compliance. The Committee may invite members of other compliance committees dealing with issues related to those before it for consultation.

<sup>192</sup> 1995 Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean (Barcelona Convention) (in force 9 July 2004). Text available online at: [http://195.97.36.231/dbases/webdocs/BCP/bc95\\_Eng\\_p.pdf](http://195.97.36.231/dbases/webdocs/BCP/bc95_Eng_p.pdf). See Decision IG 17/2 (2008) *Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocol*, para. 37.

<sup>193</sup> See Decision RC-4/7 (2008) *Procedures and mechanisms on compliance with the Rotterdam Convention*. The draft text is annexed to this decision and the relevant paragraph number is 28.

<sup>194</sup> See Decision SC-4/33 (2009) *Procedures and mechanisms on compliance with the Stockholm Convention*. The draft text is annexed to this decision and the relevant paragraph is number 35. In contrast to the draft compliance decision negotiated under the auspices of the Rotterdam Convention, which permits the Compliance Committee to solicit additional information from other committees on the request of the Meeting of the Parties or directly, the draft decision under the Stockholm Convention has imposed square brackets around the text that would permit the Compliance Committee to seek information directly from other institutions without the prior permission of the Meeting of the Parties.

<sup>195</sup> See Decision IX/10 *Cooperation and coordination among the Basel, Rotterdam and Stockholm conventions* (2008) at paras. B.2 and B.3.

<sup>196</sup> See the *Report of the Joint Meeting of the Tuna RFMOs*, January 22 – 26 2007, Kobe, Appendix 14; *Report of the RFMOs Chairs' Meeting*, San Francisco, February 5 – 6 2008 at para. 3(d).

<sup>197</sup> Joint Mission of the Expert Team of the European Commission and International Conventions to the 'Brystoe project' in the Ukrainian part of the Danube Delta (6 – 8 October 2004). Report available online at: [http://ec.europa.eu/environment/enlarg/bystroe\\_docs/bystroe\\_joint\\_mission\\_report.pdf](http://ec.europa.eu/environment/enlarg/bystroe_docs/bystroe_joint_mission_report.pdf).

<sup>198</sup> Letter from the Executive Secretary of the UNECE to the Ministry of Environmental Protection of Ukraine (Ref ECE/EHLM/104/2008/1) and Background Note dated 9 May 2008 on file with author.

<sup>199</sup> Personal communication from the secretariat of the 1991 Espoo Convention dated 15 July 2010 (on file with author).

developments related to the construction of the Brystroe Canal, which seem to contradict the formal communications from authorities in Ukraine and may lead to breaching provisions of relevant multilateral environmental agreements. The organizations agreed to discuss at the next meeting possible concerted actions to ensure compliance by the government of the Ukraine with relevant international agreements and decisions taken by international organizations.<sup>200</sup>

This ad hoc informal arrangement between the institutions of up to seven different MEAs, which focuses on not only information sharing but also on the development of mutually reinforcing compliance measures, demonstrates the possible extent and depth of potential cooperation between non-compliance bodies. Nevertheless, it is important to note that despite six years of apparently fruitful cooperation among these institutions, the Ukraine remains in non-compliance with a number of its treaty obligations in connection with the Brystoe Canal project. Moreover, it is far from certain that states parties to MEAs more generally would be keen to develop formal cooperative arrangements with respect to compliance or establish joint compliance institutions. It is notable that members of the ad hoc joint working group on enhancing cooperation among the Basel, Rotterdam and Stockholm conventions demonstrated minimal enthusiasm for the idea of a joint compliance committee for the three conventions.<sup>201</sup> Given that the report of the working group recommended – and indeed led to – unprecedented and wide-ranging integration initiatives amongst the three chemicals conventions, their reservations over a joint compliance committee is significant. However, there are a wide range of measures short of full institutional integration that might be adopted by MEAs to promote the exchange of information and to facilitate the adoption of compatible and mutually supportive compliance measures.

### PART III

#### 6. SELECTED RISKS ASSOCIATED WITH INSTITUTIONAL INTEGRATION AND CLOSER COOPERATION

Whilst it is generally agreed that institutional integration will improve and strengthen environmental governance leading to a more effective implementation of environmental commitments, there are also risks associated with closer cooperation.

First, from the perspectives of states – and potentially other participants – there is a risk that they may become drawn into regimes which they are not party to or affiliated with, but by virtue of a cooperative arrangement, may become implicitly subject to that regime's obligations. For example, Argentina has recently expressed significant reservations in respect of CCAMLRL's participation in the Regional Fisheries Bodies Secretariat Network (RSN). In particular, Argentina is concerned about the "implications for CCAMLRL of an institutional and collective involvement with organisations which differ from CCAMLRL in their objectives and membership."<sup>202</sup> Argentina's objection to this cooperative arrangement between CCAMLRL and the RSN appears to result from the fact that it is not a party to the 1995 Fish Stocks

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<sup>200</sup> Note: *Current activities related to the Brystoe canal project under multilateral environmental agreements and by intergovernmental organizations* (28 September 2009) (on file with author).

<sup>201</sup> *Report of the ad hoc joint working group on enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm conventions on the work of its second meeting*, Vienna, 10 – 13 December 2007 (UNEP/FAO/CHW/RC/POPS/JWG.2/18) at para. 36. One member commented that a joint compliance committee was a "long term option" and another said that such a committee "could not be envisaged." A third member indicated that "the scope for coordinated activities on compliance overall was very limited."

<sup>202</sup> See the *Report of the Twenty-eighth Meeting of the CCAMLRL Commission* (2009) at para. 15.17.

Agreement<sup>203</sup> and that it does not consider the Agreement to be part of customary international law.<sup>204</sup> Implicitly, Argentina appears to regard the increased institutional cooperation between RFMOs under the auspices of the RSN as supporting the implementation of the 1995 Fish Stocks Agreement and, more significantly, contributing to the process of incorporating that Agreement into customary international law. From an environmental perspective this risk as perceived by states and other participants may have positive effects; increasing participation within environmental and fishery regimes directly or indeed indirectly will likely contribute to better and more comprehensive environmental management. However, there is – at least potentially – a further risk in that a state or other participant that objects strongly to a cooperative arrangement may withdraw from the cooperating regime altogether.

The second risk arises from the possibility that through participating in a cooperative arrangement, a regime or institution may overreach its regulatory mandate and may act in a manner which might be considered *ultra vires*. This may occur if the cooperative arrangement has the practical effect of extending the geographic scope of the regime or where the subject matter of the regime has been expanded to include species, ecosystems, substances or issues not previously regulated by that regime. For example, during the negotiations within the CCAMLR Commission in connection with the proposed MOU with ACAP in 2009, there was some disagreement over whether the Commission was entitled to regulate activities taking place outside of the CCAMLR area.<sup>205</sup> Whilst Argentina was firmly of the view that activities outside of the CCAMLR area are beyond the jurisdiction of the Commission,<sup>206</sup> Australia, New Zealand, the UK and the USA disagreed.<sup>207</sup> Australia asserted an expansive view of the Commission's regulatory mandate, which supported the adoption of conservation measures of application outside the CCAMLR area where those measures are designed to conserve Antarctic marine living resources situated within the CCAMLR area.<sup>208</sup> Whilst the development of – particularly wide-ranging – cooperative arrangements may lead to tensions within individual respective regimes, the implicit expansion of a regime's or institution's regulatory mandate may nevertheless have positive implications for the effectiveness of environmental protection overall.

The third risk is associated with the cooperative arrangement itself and its participating regimes and institutions rather than with the individual states parties and other participants within those regimes. Where a cooperative or institutional integrated management arrangement comprises participants that are unequal in size or status it is possible that the arrangement may become dominated by those participants. This may lead to the prioritisation of the dominant participant's interests and objectives and ultimately, may result in the diversion of scarce resources away from the priorities of other participants. Similarly, it is also possible that a cooperative arrangement may become dominated by procedures, principles and concepts that are prevalent within one regime at the expense of other procedures, principles and concepts that are utilised within other regimes and institutions. This has already occurred to a limited extent within the Biodiversity Liaison Group, which is dominated by the 1992 Biodiversity Convention. A degree of tension as noted above has already occurred within this Group between a number of the participants over differences in priorities – including the 2010 Biodiversity Target – and the allocation of scarce resources.<sup>209</sup> Nevertheless, this risk can be mitigated with relative ease through careful drafting of the cooperative agreement within which priorities, procedures and

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<sup>203</sup> The UN Agreement for the Implementation of the Provisions of the 1982 UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (in force 2001). Text available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement>.

<sup>204</sup> See the *Report of the Twenty-eighth Meeting of the CCAMLR Commission* (2009) at paras. 5.18 – 5.19.

<sup>205</sup> *Ibid* at para. 15.8.

<sup>206</sup> *Ibid*.

<sup>207</sup> *Ibid* at para. 15.9.

<sup>208</sup> *Ibid* at para. 15.10.

<sup>209</sup> See the text accompanying notes 148 and 149 above.

principles agreed upon by all participants are clearly set out and which includes appropriate provisions for protecting the autonomy of the respective participating regimes and institutions.

Finally, increased integration and closer cooperation may in rare instances simply transfer a problematic issue from one regime to another without resolving the problem and with potentially dire consequences for the future effectiveness of that other regime. For example, it has been suggested that the parties to the 1959 Antarctic Treaty should address Japanese scientific whaling activities located within the Southern Ocean through the ATCM. In light of the fact that the whaling activities taking place are ostensibly “scientific” and that they are located within the Antarctic Treaty area, there is a strong legal argument for suggesting such activities should be subject to the principles of environmental impact assessment under Article 8 and Annex I of the 1991 Environmental Protocol to the 1959 Antarctic Treaty.<sup>210</sup> Irrespective of the legal merits of this argument<sup>211</sup> the political implications of involving the Antarctic Treaty directly or indirectly – through increased cooperation with the IWC – in the scientific whaling dispute could be disastrous. The disagreement over Japanese scientific whaling has polarised and virtually paralysed the International Whaling Commission to the extent that its very existence has been called into question. By contrast, the Antarctic Treaty system works well – notwithstanding the dispute over scientific whaling – principally because thus far it has sensibly avoided directly addressing Japanese whaling activities within the ATCM.<sup>212</sup> In the Antarctic it might be suggested that fragmentation helps rather than hinders effective environmental governance!

The risks identified above relate to both the effectiveness and the legitimacy of international environmental governance. In particular, increasing and more complex cooperative institutional arrangements raise important questions of accountability. This is particularly the case where the cooperative arrangements comprise or are largely driven by treaty secretariats rather than by the states parties themselves. It has been noted that “while environmental governance by no means achieves a democratic or deliberative ideal, it is among the most transparent, participatory, and accessible realms of global governance to state and non-state actors alike.”<sup>213</sup> The development of cooperative and integrated institutional regimes in pursuit of effectiveness should not come at the expense of legitimacy and accountability. Ideally, the development of governance solutions based on cooperation and institutional integration should be designed to promote both effectiveness and legitimacy. The clustering of the Basel, Rotterdam and Stockholm conventions provides an excellent example of such an arrangement.

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<sup>210</sup> The extent of the relationship between the Environmental Protocol and the 1946 International Convention on the Regulation of Whaling is unclear. Annex II of the 1991 Environmental Protocol to the 1959 Antarctic Treaty, which sets out restrictions in connection with the taking or harmful interference of species, is not applicable to Japanese whaling activities as it contains a without prejudice clause, which confirms that “[n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention on the Regulation of Whaling” (Annex II, Article 7). There is no such clause in Annex I of the Environmental Protocol or in the Protocol itself. However, the Final Act of the Eleventh Special Antarctic Treaty Consultative Meeting at which the Protocol was adopted stipulates that “[t]he meeting noted that nothing in the Protocol shall derogate from the right and obligations of Parties under the Convention on the Conservation of Antarctic Marine Living Resources, the Convention for the Conservation of Antarctic Seals and the International Convention for the Regulation of Whaling.” (para. 7).

<sup>211</sup> A discussion of the merits is beyond the scope of this article. For a detailed analysis of some of the issues raised by Japanese whaling issues within the Southern Ocean see the special issue of the 11(3) & (4) (2008) *Asia Pacific Journal of Environmental Law*.

<sup>212</sup> The closest the ATCM has come to discussing Japanese whaling was in 2007 when New Zealand presented Information Paper 40 (2007) relating to the fire on board the Japanese whaling vessel the *Nisshin Maru*, which took place in February 2007. The discussion at the XXX ATCM focused on the safety and search and rescue aspects of this incident and was promptly shut down by Japan which stated that “it would not be constructive to further discuss the *Nisshin Maru* incident in the next Meeting because further discussion on this incident might lead to discussion on the whaling issue, on which Parties had differing views.” See the *Final Report of the Thirtieth Antarctic Treaty Consultative Meeting*, New Delhi, 30 April – 11 May 2007 at paras. 225 – 231.

<sup>213</sup> Steven Bernstein, “Legitimacy in Global Environmental Governance” 1 (2005) *Journal of International Law and Relations* 139 - 166 at 140.

The development of the chemicals cluster has been driven by the states parties themselves and decisions relating to substance, administration and management have been taken by both ordinary and extraordinary conferences of parties. It is notable that the less ambitious – and arguably less effective – examples of the Biodiversity Liaison Group and (to a lesser extent) the five tuna RFMOs acting collectively pursuant to the Kobe process, are both driven by treaty institutions without direct involvement of state parties. Consequently, it would appear that states parties to MEAs must themselves play a meaningful role in developing cooperative and integrated governance mechanisms, not only with a view to promoting legitimacy and accountability but ultimately, effectiveness.

## 7. CONCLUDING REMARKS: ENHANCING INSTITUTIONAL INTERACTION AND ENVIRONMENTAL GOVERNANCE AND ITS IMPLICATIONS FOR INTERNATIONAL LAW

The processes of globalisation and fragmentation of international law cannot be reversed but can be managed. Moreover, governance mechanisms such as institutional cooperation and integration offer substantial potential to not only manage but to exploit the overlaps and synergies that exist between MEAs and environmental institutions in order to improve environmental protection. To a greater or lesser extent many MEAs – often as a result of institutional initiatives – are already beginning to engage in project and programmatic collaboration, integrated or even joint administration and management of MEAs and cooperation with respect to implementation and compliance mechanisms. Whilst these initiatives are broadly aimed at improving the effectiveness of MEAs they can also enhance their legitimacy at the national, regional or international level. Nevertheless, extensive cooperation and institutional integration also poses risks – actual and perceived – to the legitimacy and accountability of MEAs to their states parties. Maximising the potential of institutional cooperation and integration, whilst minimising its risks to legitimacy, accountability and indeed effectiveness, is likely to prove a significant challenge for future international environmental governance. One possible response to that challenge is to deliberately manage institutional integration and other cooperative arrangements through an overarching global environmental institution such as a strengthened UNEP<sup>214</sup> or even a newly created ‘world environmental organisation’.<sup>215</sup>

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<sup>214</sup> UNEP as an organisation has been subject to consistent and cogent criticism over its performance almost since its inception. All four UN-related international environmental governance reform processes noted in Part I of this article (see text accompanying notes 26 – 35 above) recommended that consideration be given to strengthening UNEP through enhancing its legal mandate, opening it up to universal membership, improving its financial basis and turning it into the ‘environmental pillar’ of the UN. For a critical assessment of UNEP’s performance see: Steinar Andresen, “The Effectiveness of UN environmental institutions” 7 (2007) *International Environmental Agreements* 317 – 336; Steffen Bauer, “The Secretariat of the United Nations Environment Programme: Tangled up on the Blue” in Frank Bierman and Bernd Siebenhüner (eds) *Managers of Global Change: The Influence of International Environmental Bureaucracies* (Cambridge, Massachusetts: The MIT Press) (2009) 169 – 201; Maria Ivanova, “UNEP as anchor organisation for the global environment” in Frank Biermann, Bernd Siebenhüner and Anna Schreyögg, *International Organizations in Global Environmental Governance* (London: Routledge) (2009) 151 – 173; Philippe Roche and Franz Zaver Perrez, “International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient Environmental Regime” 16 (2005) *Colorado Journal of International Environmental Law and Policy* 1 – 26.

<sup>215</sup> The creation of a new ‘world environment organisation’ has been suggested by a number of commentators. See Frank Bierman et al, “Environmental policy integration and the architecture of global environmental governance” 9 (2009) *International Environmental Agreements* 351 – 369; Dena Marshall, “An Organization for the World Environment: Three Models and Analysis” 15 (2002 - 2003) *Georgetown International Environmental Law Review* 79 – 103. For a critical view of the ‘world environment organisation’ proposal see Sebastian Oberthür and Thomas Gehring, “Reforming International Environmental Governance: An Institutional Critique of the Proposal for a World Environment Organisation” 4 (2004) *International Environmental Agreements: Politics Law and Economics* 359 – 381.

Regardless of how initiatives promoting institutional integration or cooperation are managed in the context of future international environmental governance, there is little doubt that their impact is already challenging the traditional landscape of international law. Non-state actors have long been present within the field of international environmental law but they are becoming increasingly dominant through their participation within the areas of creation, implementation and enforcement of international environmental law. The vast number of decisions, resolutions, agreements and other instruments are all integral components of the rich tapestry of an MEA, and the hard distinction between binding and non-binding instruments is increasingly blurred. Moreover, the very nature of international law as a system of law based on the consent of states is being brought into question. The development of complex systems of cooperation and integration in practice has the potential to lead to the development of norms outside of the fora within which states normally give their consent. This may occur in circumstances where MEA institutions acting collectively develop norms that become binding on states without their formal acceptance or where the practice of MEAs acting individually or collectively contributes the formation of customary international law. The potential impact of these new forms of international environmental governance thus extends well beyond the realm of international environmental law; they challenge the very fundamentals of the system itself – who we regard as participants within the system, the sources of international law and even its ultimate basis in consent.